



**LEGAL ISSUES IN THE CONTEXTUAL DIFFUSION OF  
INDEPENDENT REGULATORY AGENCIES IN  
NIGERIA**

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in the Department of Public Law  
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Submitted by  
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August 12, 2015

Signed by candidate
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Terhemmen Andzenge

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August, 2015, Cape Town, South Africa.

**ABSTRACT****Thesis Title****Legal Issues in the Contextual Diffusion of Independent Regulatory Agencies in Nigeria**

Submitted by Terhemmen Andzenge - August 2015

In the last three decades, there has been a phenomenon, akin to a revolution sweeping through the world, leaving in its wake major consequences of economic, political, legal and constitutional dimensions. The role of the state as we know it has been reconstructed beyond recognition. From an all-encompassing monolith that owns, manages, and provides various infrastructures, goods and services directly to the public and also serves as a regulator, it has now been reduced to a mere bystander or an enabler. Its footprints in the sands of economic and political times have diminished. In its place has arisen the regulatory state, characterised by a thinning out of the state; and the emergence of an institutional innovation: the Independent Regulatory Agency. Its rise, growth and diffusion across jurisdictions and sectors, and most recently in developing countries including Nigeria have been unprecedented.

This thesis centres on the question whether the Independent Regulatory Agency can function in Nigeria in a manner analogous to its counterparts in the developed economies and be able to ensure the provision of safe, affordable and efficient infrastructures and services. The thesis finds institutional fragility, limited capacity, information asymmetry, corruption and insecurity within critical political, economic and supporting institutions that ideally gives life and legitimacy to the IRA; while essential democratic concepts are adhered to more in the breach. These challenges present a difficult climate in which the Independent Regulatory Agency can thrive. As an alternative, the thesis advocates the adoption of two transitory regulatory models: regulatory contracts and contracting out or outsourcing of functions. Their utilisation would achieve the desired regulatory outcomes until maturity is attained in the political economy of Nigeria, while simultaneously mitigating its contextual limitations.

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## ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
AERC	African Economic Research Consortium
BPE	Bureau of Public Enterprises
CPI	Corruption Perception Index
CSO	Civil Society Organisation
EC	Energy Commission
EPSRA	Electric Power Sector Reform Act
EU	European Union
FNDP	First National Development Plan
FTC	Federal Trade Commission
GDP	Gross Domestic Product
ICC	Interstate Commerce Commission
IMF	International Monetary Fund
INEC	Independent National Electoral Commission
IP	Intellectual Property
IRA	Independent Regulatory Agency
NBA	Nigerian Bar Association
NCC	Nigerian Communications commission
NERC	Nigerian Electricity Regulatory Commission
NGO	Non-Governmental Organisation
NPC	Northern People's Congress
OECD	Organisation for Economic Co-operation and Development
OFTEL	Office of Telecommunications

OMB	Office of Management and Budget
PURC	Public Utilities Regulatory Commission
SAP	Structural Adjustment Programme
SME	Small and Medium Enterprises
SNDP	Second National Development Plan
SOE	State Owned Enterprise
UK	United Kingdom
USA	United States of America
USAID	United States Agency for International Development
USD	United States Dollar
WJP	World Justice Project



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## CHAPTER 1

### INTRODUCTION

#### **1.1 Preamble**

At independence, nearly all African countries including Nigeria considered capitalism a tool of neo-colonialism rather than an economic system espousing market driven entrepreneurship. As a result, a public sector/state led approach to economic development was the preferred option. The government's role in economic activities expanded as it became owner/investor, manager/entrepreneur, manufacturer/producer; and regulator of the public goods and services through State Owned Enterprises (SOEs).

The global economic and financial crisis of the 1980s halted the steady flow of oil revenues to the national treasury and this affected the capacity of government to fund the budgets of SOEs. In addition, the performance of the SOEs was dismal and economic reforms became inevitable. The reforms ushered in an institutional innovation, the Independent Regulatory Agency (IRA) model as a panacea for attracting the needed private sector financing for the provision of infrastructure and public goods. This model has grown dramatically in the last decade.

The rise, growth and diffusion of IRAs across jurisdictions and sectors, and most recently in developing countries including Nigeria, have been unprecedented. The twin themes of this thesis are, generally, to ascertain if the IRAs can thrive in an unprepared climate of weak institutional endowments which developing countries such as Nigeria possesses, and more specifically, whether they are the most appropriate model to address the challenges of infrastructure provision and services in Nigeria.

## 1.2 The Colonial Era

Nigeria as a nation state became a political reality in 1914 with the amalgamation<sup>1</sup> of the Colony and Protectorate of Lagos, the Protectorate of Southern Nigeria, and the Protectorate of Northern Nigeria, which had hitherto been separately governed, into one geographic entity. The British colonial administration effected this amalgamation for a variety of reasons. These included administrative convenience, economic expediency, and the British desire for a more concerted political and economic presence in the Nigerian region in order to fend off French and German traders and military expeditions.<sup>2</sup> The expeditions had become more frequent after the Berlin Conference of 1884-1885 which triggered the “Scramble for Africa.”<sup>3</sup>

Other reasons for the amalgamation included the desire to integrate the various subsistent economic enclaves of Nigeria into the world economy, and the strong lobby of British businessmen for the regulation of what they perceived as untidy competition among British firms. Finally, there was the push by Christian missionaries for the British government to enter into areas where they had converted locals from traditional practices to Christian civilisation, in order to prevent them from slipping back to practices they considered primitive or uncivilised.<sup>4</sup>

Prior to the arrival of the British, the territory later to be known as Nigeria was home to “sprawling empires, numerous centralized states, and a multiplicity of smaller, segmentary lineage societies.”<sup>5</sup> These communities had “long-standing inter- and international commercial networks” in addition to external links in facilitation of the

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<sup>1</sup> Oyeboode, A., ed., *The Foundations of Modern Nigeria, Essays in Honour of Toyin Falola*, African World Press, Inc., 2003 at 16; Hopkins, A.G., *An Economic History of West Africa*, New York: Colombia University Press, 1973, Chapter 6.

<sup>2</sup> Falola, T and Heaton, M.M., *A History of Nigeria*, 2008, Cambridge University Press, at 85 – 93 and 116 – 117.

<sup>3</sup> Blij, H.J., Muller, P.O., *Geography: Realms, Regions and Concepts*, 2007, Wiley-Blackwell Publishers, 13<sup>th</sup> edition at 304-305.

<sup>4</sup> Falola and Heaton, note 2 at 86.

<sup>5</sup> Lewis, P.M., *Growing Apart, Oil, Politics, and Economic Change in Indonesia and Nigeria*, The University of Michigan Press, 2007 at 125-126.

booming trans-Atlantic slave trade.<sup>6</sup> There were in existence, in one form or another, infrastructural backbone bases. Rivers served as avenues for movement of goods and trade, while winding road networks connected villages, towns and regions.

With the unification of all the Protectorates into one administrative entity, the colonial government commenced what was to be the foundation for the economic policy of the now unified Nigeria. The economic path had three essential goals.<sup>7</sup> The first goal was the expansion of the Nigerian market through the exploitation and exportation of raw materials, agricultural and minerals resources<sup>8</sup> and the importation of refined products.<sup>9</sup> Nigeria's huge mineral endowments were an overriding attraction to the colonial government because the structure of the world economy then was dependent on minerals<sup>10</sup> to fuel the Industrial Revolution in Europe.<sup>11</sup>

The second goal was to bring Nigeria into a cash economy that would be tied to the British currency. This was achieved with the introduction of a monetary system to replace the trade by barter system that was in use in the pre-colonial period.<sup>12</sup>

The third goal, drawing from the second, was to integrate the scattered indigenous people who were mainly agriculturists and traders into the new monetary system. This was achieved by introducing uniformity and a common mode of exchange for all business transactions among the indigenous people and also with the colonial administration.

The most important export crops produced in colonial Nigeria were groundnuts and cotton in the north, cocoa in the southwest and palm produce in the southeast. The

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<sup>6</sup> Falola and Heaton, note 2 at 9; Imbua, D.L *Two Hundred Years After the Abolition of Trans-Atlantic Slave Trade: Reflections on the Legacy of the Slave Trade and Slavery in Nigeria*, Tarikh, New Series Issue 2, 2009, Published by the Historical Society of Nigeria at 1-14.

<sup>7</sup> Falola and Heaton, note 2 at 119 – 122; Oyeboode, note 1 at 267.

<sup>8</sup> Oyeboode, Note 1 at 18.

<sup>9</sup> This model of open economy is discussed in detail in Peter Kilby, *Industrialization in an Open Economy: Nigeria, 1945 -1966*, Cambridge University Press, 1969.

<sup>10</sup> Onimode, B, A., *Political Economy of the African Crisis*, Institute for African Alternatives, 1988, Zed Books, London at 4-6.

<sup>11</sup> The Industrial Revolution is the name given to the period in the 18th and 19th centuries when Britain was transformed from a predominantly agricultural nation into the manufacturing workshop of the world. The period saw rapid scientific, technological and commercial innovations.

<sup>12</sup> Oyeboode, note 1 at 19.



main mineral exports from Nigeria were tin and, to a lesser degree, gold, silver, lead, and diamonds. Coal, discovered in the southeast near the city of Enugu, also became a major strategic mineral of the colonial government, extracted to fuel the country's railway.<sup>13</sup> In addition, palm oil, palm kernels and rubber were produced in the southern part of Nigeria, deep in the interior over 320 kilometres from the coastal ports. Benniseed, hides and skins, and tin ore were produced in the north at distances ranging from 650 to 965 kilometres from Port Harcourt, the nearest port.<sup>14</sup>

The colonial government realised from the onset that its goal of exploiting and transporting raw materials and minerals from the interior of Nigeria to the coastal towns for onward shipment to the industries of Europe was impossible without the development of a transportation and communication infrastructure network. They therefore commenced the development of a network of roads, rail lines, waterways, telecommunications, and a postal system, which were some of the earliest developed infrastructures.<sup>15</sup>

Government introduced various schemes to develop the waterways,<sup>16</sup> which then were the only viable, easy and cheap form of transportation and movement of goods. Telegraph cables were also laid, particularly along the railway lines, to improve communication and keep the trains running smoothly.<sup>17</sup> The colonial government also built the Lagos and Port Harcourt ports<sup>18</sup> to allow steam powered ships to dock and carry cargo to Europe.

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<sup>13</sup> Falola and Heaton, note 2 at 119 – 120.

<sup>14</sup> Gana, A.T, *The Quest for Autonomy, Nigeria and Foreign Monopoly Capital, 1966-1978*, Unpublished Thesis for a Doctor of Philosophy, Colombia University, 1980 at 50.

<sup>15</sup> Oyebode, note 1 at 18. See also Gana, note 14 at 50, Toyin and Heaton, note 2 at 120; Tamuno, T., *The Genesis of Nigerian Railways, Parts 1 & 2*, Nigeria Magazine, 83, 1964 at 279-292; Oyemakinde, W., *Railway Construction and Operation in Nigeria, 1895 – 1911*, Labour, Problems and Social Economic Impact, J.H.S.N., Vol.7, No. 2, 1974 at 303-324; Oshin, S., *Colonial Railway Policy in Northern Nigeria, 1898-1914*, ODU, Journal of West African Studies, 35, 1989 at 161-187.

<sup>16</sup> Falola and Heaton, note 2 at 120.

<sup>17</sup> Ibid.

<sup>18</sup> Ogunremi, G.O and Faluyi, E.K , eds, *An Economic History of West Africa*, Mayode Ajayi Enterprises, 2009 at 158.

By far, the most revolutionary infrastructural system to be introduced by the colonial government was the railway system.<sup>19</sup> The first rail line in Nigeria was between Lagos and Ota in 1898 and by 1914 there were separate rail lines in the South Western, Northern and the Eastern parts of Nigeria.<sup>20</sup> All three lines were joined in 1926 in Kaduna, thus completing the most decisive infrastructural backbone integrating the three regions into a single economic block.<sup>21</sup> Road infrastructure, though initiated earlier than the railway, failed to receive meaningful attention until the advent of the railways. It was the need to build feeder roads to link the newly constructed rail lines that gave rise to road construction.<sup>22</sup> The introduction of motor vehicles into the country between 1907 and 1909 further served as an impetus to develop road transportation.<sup>23</sup>

Air transportation infrastructure was introduced to complete the transportation and communication cycle in 1931 with the arrival of a sea plane from England. By 1935, there were five functioning and fully equipped aerodromes in Lagos and Oshogbo in the South and Minna, Kano and Maiduguri in the North in addition to ten landing strips spread round the country.<sup>24</sup> In the same year, the colonial government commenced airmail and postal services between the UK and Nigeria. This was closely followed by the introduction of telegraphic and telephone services in 1947.<sup>25</sup>

Other crucial infrastructure systems that were deployed by the colonial government were in the financial, legal and social sectors. These included court houses, banks, insurance companies, hospitals, schools, water systems, and electricity, among

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<sup>19</sup> Studies on the Nigerian Railway System are numerous, among which are Tamuno, T., *The Genesis of Nigerian Railways, Parts 1 & 2*, Nigeria Magazine, 83, 1964 at 279-292; Oyemakinde, W., *Railway Construction and Operation in Nigeria, 1895 - 1911*, Labour, Problems and Social Economic Impact, J.H.S.N., Vol.7, No. 2, 1974 at 303-324; Oshin, note 15.

<sup>20</sup> Falola, T, *The History of Nigeria*, Westport: Conn. Greenwood Press, 1999 at 74-75 in Oyebode, note 1 at 35.

<sup>21</sup> Gana, note 14 at 52; Oyebode, note 1 at 349-350.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

others.<sup>26</sup> All these had one essential feature: the facilitation of the colonial government's quest to exploit, transport and ship agricultural products and mineral resources to Europe and to import manufactured or refined products back to Nigeria.<sup>27</sup>

The outbreak of the Second World War provided a further surge in the development of additional infrastructures that had been lacking since the amalgamation of Nigeria and also to support the war effort. Falola and Heaton<sup>28</sup> note that as a part of these initiatives, the colonial government invested in the further development of infrastructure such as maritime harbours, railways, airfields and military hospitals. Social infrastructure in the form of training centres that would churn out technicians, electricians, nurses, carpenters and clerks were also established.

### **1.3 Nigeria at Independence**

At independence, even though the Union Jack<sup>29</sup> had been lowered and the Nigerian flag hoisted, nothing much changed, except flags.<sup>30</sup> The newly independent nation was dependent on the British economic system.<sup>31</sup> Simply put, Nigeria's economy was one in which the people produced what they did not consume and consumed what they did not produce.<sup>32</sup> Walter Rodney<sup>33</sup> aptly captured the above situation by stating that Europeans determined the kind of goods to be exported to the colonies and indigenous people did not have a choice as to what was sent to them, the latter being essentially a consumer oriented society.

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<sup>26</sup> Ibid.

<sup>27</sup> Peel, M., *A Swamp Full of Dollars, Pipelines and Paramilitaries at Nigeria's Oil Frontier*, 2010, BookcraftAfrica, Ibadan, Nigeria at 41. See also Falola and Heaton, note 2 at 121-122; Ikpeze, N., 1991 "New Industrial Policies and Perspectives for Manufacturing in Nigeria," In Hans, H. Bass et al (Eds.), *African Development Perspective Yearbook 1990/91 Vol.II*. Hamburg: Lit Verlag; and Oyebo, note 1 at 19.

<sup>28</sup> Falola and Heaton, note 2 at 143.

<sup>29</sup> The Union Jack, also called the Union Flag, is the national flag of the United Kingdom.

<sup>30</sup> Onimode, note 10 at 19.

<sup>31</sup> Meredith, M., *The State of Africa, A History of Fifty years of Independence*, The Free Press, London, 2005, at 153.

<sup>32</sup> Onimode, note 10 at 2.

<sup>33</sup> Rodney, W., *How Europe Underdeveloped Africa*, Dar Es Salaam, Tanzania Publishing House, 1972 at 86.

Apart from agriculture which was exclusively in the hands of Nigerians, all the other sectors of the economy including the financial, manufacturing, mining, and petroleum sectors and distributive trades, were mostly reserved for and in the hands of foreigners.<sup>34</sup>

#### **1.4 Post Independence**

After independence therefore, the realisation dawned that independence goes beyond exchanging the flag and there were enormous challenges and problems to be confronted and surmounted. Although, the problems were overshadowed by what has been termed the “infectious enthusiasm”<sup>35</sup> of independence, it was clear that Independence was not an end in itself but a stage in a journey. The infrastructure inherited from the colonial government, apart from being inadequate, was ageing and had diametrically opposed objectives. While the development of infrastructure under the colonial government was essentially to facilitate the objects of colonialism, the newly independent government realized that it had to go beyond this. The provision of infrastructures that were essential to the socio-developmental well-being of the new nation such as roads, energy, telecommunication and social infrastructure became of paramount concern to the government.

##### **1.4.1 Evolution of Development Plans**

In order to address the infrastructure deficits that were inherited from the colonial administration, the new government began the process of evolving a holistic development plan for the socio-economic development of the nation. In 1962, the government developed and began the implementation of the First

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<sup>34</sup> Research Department, Central Bank of Nigeria, 1979, *Twenty years of Central Banking in Nigeria, 1959-79*, Lagos at 13; Teriba, O. and Kayode, N.O. eds, *Industrial Development in Nigeria: Patterns, Problems and Prospects*, Ibadan University Press, 1977 at 160; Oyeboade, note 1 at 18.

<sup>35</sup> Gana, note 14 at 75. See also the Independence Speech by Sir Abubakar Tafawa Balewa, the Prime Minister on the occasion of the formal transfer of power from Britain to Nigeria in Sir Alan Burn's *History of Nigeria*, Harper and Row, New York, 1972 at 340; and also Meredith, note 31 at 141 where the euphoria of independence was termed a “short-lived honeymoon.”

National Development Plan (FNDP) which was to run until 1968 but was halted on the outbreak of the civil war in 1967. The FNDP hinged on government's expectation that massive private foreign investments would pour in to help jumpstart the economy and build infrastructure.<sup>36</sup> However, the expectations of the FNDP were not realised as out of the 50% foreign capital that was projected to be injected into the economy, a meagre 14% came in.<sup>37</sup>

The dismal performance of the FNDP jolted government and prompted a rethink which led to a major policy reversal which came in the form of the Second National Development Plan (SNDP) in 1974. Under the SNDP, government assumed leadership for the planning, building and deploying of infrastructure and services to the nation, a radical departure from the FNDP.<sup>38</sup> This shift in policy was a clear renunciation of the philosophy of private sector leadership in economic development and the provision of infrastructure, to one in which the public sector (a euphemism for the State) takes leadership in the developmental process.<sup>39</sup>

This renewed role of government was informed by several factors ranging from the predominance of an expatriate private investor portfolio that had no stomach for long term investments in the new nation to the glaring lack of an indigenous private sector that could propel development.<sup>40</sup>

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<sup>36</sup>Hon. Chief P. S. Okotie-Eboh, *The Sovereignty Budget* in Nigerian Trade Journal, 2 April/June 1961 at 47 reproduced in Gana, note 14 at 90.

<sup>37</sup> Falola and Heaton, note 2 at 164.

<sup>38</sup> The thinking that the Nigerian state ought to be the catalyst for economic development was prevalent among scholars and planners as far back as the 1960s. See Lewis, note 5 at 135.

<sup>39</sup> Gana, note 14 at 120 and Teriba and Kayode, note 35 at 379 – 380.

<sup>40</sup> Ajakaiye, D.O., *Impact of Public Policy on Public Enterprises Performance in Nigeria*, Nigerian Journal of Economic and Social Studies, Vol.26, No. 3 in Obadan, M.I and Ayodele, A.S, *Commercialization and Privatisation Policy in Nigeria*, National Center for Economic Management and Administration, Ibadan, 1988 at 8.

Government utilised the institution of State Owned Enterprises “SOEs”<sup>41</sup> to achieve this. SOEs were established in virtually all the sectors of the economy with extensive monopoly powers to provide public goods and services such as transportation (rail, road, inland waterways, marine and air), oil (oil prospecting, exploration, refining and marketing), cement, fertilizer and motor assembly plants as well as steel, paper mills, telecommunication, postal system, electric power, banking and insurance sectors.<sup>42</sup> Social or soft infrastructures made up of schools and hospitals were included. A survey<sup>43</sup> showed that there were nearly 600 public enterprises at the Federal level alone and an estimated 900 at the state and local government levels. By 1990, Nigeria possessed the largest SOE portfolio in sub-Saharan Africa.<sup>44</sup>

The policy change also had ideological connotations as has been captured by Omeleke and Adeopo.<sup>45</sup> They note that the switch was informed by government’s desire to follow the Keynesian theory of aggressive state intervention in the market to propel development while simultaneously downplaying the orthodox laissez-faire economic doctrines which essentially limited governments to their traditional role of maintaining law and order.<sup>46</sup> By the mid-1980s therefore, it was all but settled that SOEs constituted the “engine of growth” for economic and infrastructural

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<sup>41</sup> State-Owned Enterprise (SOEs) refers to business entities established by central and local governments, whose supervisory officials are from the government or legal entities that carry on business or commercial activities on behalf of its owner, the state or government. SOEs are variously referred to as state or publicly owned corporation; state-owned company; state-owned entity; state enterprise; or government business enterprise. Other names include government-owned corporation, commercial government agency or public sector undertaking. See Richard J. Zeckhauser & Murray Horn, *The Control of State-Owned Enterprises*, in Paul W. Macavoy et al., *Privatization and State Owned Enterprises: Lessons from United States, Great Britain and Canada*, 10 (Kluwer Academic Publishers 1989) and also Lawrence Azubuike in “*Privatization and Foreign Investments in Nigeria*,” 13 *Tulsa. J Comp & Int’l Law*, 59, 2005 – 2006 at 1.

<sup>42</sup> Haque, S., M, *Privatization in Developing Countries: Formal Causes, Critical Reasons, and Adverse Impacts*, 1 in Ali Farazmand (ed.) *Privatization or Public Enterprise Reform?* (Westport, Conn.: Greenwood Press, 2000) at 217-238.

<sup>43</sup> Zayyad, H.R, *Privatisation and Commercialization in Nigeria*, Bureau of Public Enterprises website, [www.bpeng.org](http://www.bpeng.org) Survey undertaken by the TCPC, a body set up by the FGN to reform the public sector

<sup>44</sup> Lewis, note 5 at 251.

<sup>45</sup> Omoleke, I.I and Adeopo, A.A, *Privatization of Nigerian Public Enterprises: Its Practical Challenges as a Reformulated Policy of the Fourth Republic*, *AJPAM* Vol XVI, No. 2, July 2005 at 1-3.

<sup>46</sup> *Ibid.*

development<sup>47</sup> with the SOEs portfolio accounting for over 50% of the GDP and about 66% of the modern sector employment in Nigeria.<sup>48</sup>

Government ownership, management and provision of public goods, services and infrastructure through SOEs were made possible majorly by the accelerated exploitation of petroleum which enhanced state revenue. By 1974, oil became the mainstay of the economy upstaging agriculture.<sup>49</sup> Oil revenues accrued from foreign multinational corporations operating in the oil sector which invariably led to the establishment of a “rentier state” or “rent-seeking” state.<sup>50</sup> The reliance on one commodity, a natural resource, for economic and infrastructure sustenance laid the foundation for most of the problems that would later bedevil the Nigerian economy, such as poverty and corruption.<sup>51</sup>

### 1.4.2 Performance of SOEs

The performance of the SOEs was, for want of a milder word, dismal as it became apparent that most of the reasons behind their establishment had been subverted.<sup>52</sup>

By the early 1980s, dwindling oil revenues and a global economic recession led to the reduction of the steady flow of oil revenues to the national treasury. This meant less money to meet the mounting recurrent and capital budgets of a bulging SOE portfolio.

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<sup>47</sup> Obadan, M.I and Ayodele, A.S, *Commercialization and Privatisation Policy in Nigeria*, National Center for Economic Management and Administration, Ibadan, 1988.

<sup>48</sup> Oduola, A.F., *Privatization of Public Enterprises in Nigeria: The Journey So Far*, 2004, in Bello-Imam and Mike Obadan, eds, *Democratic Governance and Development Management in Nigeria's Fourth Republic 1999-2003*, Ibadan: Centre for Local Government and Rural Development Studies.

<sup>49</sup> Peel, note 27; Falola and Heaton, note 2.

<sup>50</sup> A rentier state or rent-seeking state exists where an economic system is rent seeking in nature. It is derived from the economic concept of “rent” which refers to earnings in excess of all relevant costs (including a market rate of return on invested assets). It essentially means the acquisition of benefits from natural endowments such as minerals without beneficiation or value added. It is a concept prevalent in many resource rich undeveloped nations such as Nigeria. Ahmet Kuru, *The Rentier State Model and Central Asian Studies: The Turkmen Case*, Turkish Journal of International Relations, Volume 1, Number 1, Spring 2002.

<sup>51</sup> Omorogbe, Y.O., *Alternative Regulation and Governance Reform in Resource-Rich Developing Countries of Africa*, in *Regulating Energy and Natural resources*, eds, Barton, et.al, Oxford University Press, 2006 at 44

<sup>52</sup> Meredith, note 31 at 277 – 229.

They were mired in several problems including ineffectiveness in the provision of goods and services for which they were set up, inefficiencies in the production of goods and services due to high cost of production, inability to innovate, and bureaucratic bottlenecks. Other problems included inadequate capitalisation, undue bureaucratic control and interference from line ministries and the political class, inappropriate technologies, bloated workforces, monopoly powers, managerial incompetence and mismanagement of funds and corruption.<sup>53</sup>

The performance of the SOEs impacted negatively on the government treasury, constituting a drain that led to huge budget deficits and high rates of inflation. On the external side, the galloping expenditures of the SOEs led to foreign exchange misalignments and a consumer oriented spending culture that worsened as external debt obligations rose.<sup>54</sup>

By the mid-1980s therefore, it was clear that the nation's economy was ailing. There was a downturn in economic activities on all sides due to the near collapse of oil prices globally. This point is better appreciated when it is recalled that Nigeria's reliance on revenue from crude oil stood at 95%. Crude oil prices, which had peaked at 49 USD in 1980, nosedived dramatically and in three years fell to a record low of less than 20 USD per barrel. By 1986, the price of a barrel of crude oil stood at a depressingly low level of 8 USD.<sup>55</sup> This led to a depression in the world production ratios, as also in Nigeria. The downward fluctuations in the price of oil, the high rate of inflation, unemployment and mounting external debt obligations coupled with political instability made the Nigerian economy very unsteady.<sup>56</sup>

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<sup>53</sup>Nwoye M.I., *Privatization of Public Enterprises in Nigeria: The Views and CounterViews*. Globalizacija : Journal for Political Theory and Research in Globalization, Development and Gender Issues, Women Center for Democracy and Human Rights, Serbia and Montenegro, 2005 at 3; Obadan and Ayodele, note 41 at 11 – 12.

<sup>54</sup> Ibid at 3.

<sup>55</sup> Obadan and Ayodele, note 47 at 11.

<sup>56</sup> Falola and Heaton, note 2 at 11.



The rentier state of the economy fuelled rampant corruption,<sup>57</sup> accompanied for most of the period, by autocratic military regimes with scant regard for the rule of law. (The military has ruled Nigeria for more than 30 years of its 53 years of independence). Subversion of basic human rights and the entronement of the “rule of men” (government officials and their cronies) over the rule of law became the norm.<sup>58</sup> Legislative and executive functions were fused into one arm of government, the ruling military junta. The judiciary was in a comatose state, unable to assert its independence due to the skewed methods of appointment to the bench, a funding structure that was tied to the whims and caprices of the military and above all the arbitrary powers of hire and fire residing in the ruling junta.<sup>59</sup>

Reforming the economy was no longer just an option but a necessity due to a combination of factors including the spike in international oil prices, the downgrade of the Keynesian to a market-driven model of economic governance following the fall of the Soviet Union<sup>60</sup>, rampant corruption and the near failed state of political and economic institutions. In addition, it was clear that Nigeria was suffering from an economic malaise known as “Dutch Disease”<sup>61</sup>, an ailment that bedevils mono - commodity dependent economies.

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<sup>57</sup> Ibid at 9.

<sup>58</sup> Ibid at 186

<sup>59</sup> Falola and Heaton, note 2 at 189.

<sup>60</sup> Haque, note 42 at 217-238.

<sup>61</sup> Dutch disease is prevalent in countries with large endowments of natural resources, that often performs worse in terms of economic development and good governance than do countries with fewer resources. Such endowments too often impede rather than advance sustainable development of subject countries. The trend was first observed in the Netherlands in the 1950s when abundant natural gas production brought rapid foreign revenue but declining local productive sector. See Omorogbe, note 52.

### 1.4.3 Advent of Reforms

In reaction to the economic crisis, the government undertook a Structural Adjustment Programme (SAP)<sup>62</sup> that was patterned along guidelines developed by the World Bank, the International Monetary Fund, other international financial institutions, donor agencies, investment banks, and financial advisers (referred to as “intermediating agencies<sup>63</sup>) in 1986. Market-centred policies such as deregulation, privatisation, regulation, liberalisation, and rationalisation were adopted or imposed.<sup>64</sup>

In doing this, Nigeria was merely taking a familiar road, trodden by other African nations in similar economic situations. During the same period, thirty-six other countries in sub-Saharan Africa entered into structural adjustment agreements with the intermediating agencies in the process executing a total of 243 loan agreements.<sup>65</sup>

Riding on the wave of these reforms, the government instituted economic changes premised on the fundamental objective of minimising state involvement in the economy through privatisation of the SOEs. This was done with the hope that it would promote private sector participation, reduce the financial burden on government to fund huge recurrent and capital budgets of SOEs, and provide for the much-needed economic development objectives of the nation and its infrastructural needs.

The ensuing privatisation programme, touted to be one of the biggest in the world,<sup>66</sup> witnessed the sale to the private sector of over 140 SOEs, spanning automobile assembly plants, bricks and clay factories, cement factories, industries, mines, banks, insurance companies, and aviation service providers. The sale included hotels,

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<sup>62</sup> Structural Adjustment refers to "a series of economic policies designed to reduce the role of government in an economy [by] replacing government control with market incentives." In Guseh, J.S., *The Public Sector, Privatization, and Development in Sub-Saharan Africa*, *African Studies Quarterly* | Volume 5, Issue 1 | Winter 2001; Lewis, note 5 at 162-164.

<sup>63</sup> Dubash, N., *Regulation through the Back Door: Understanding the Implications of Institutional Transplant*, Working Paper No. 42, Jerusalem Papers on Regulation and Governance, March 2012 at 4.

<sup>64</sup> Haque, note 42 at 217-238.

<sup>65</sup> Meredith, note 31 at 371.

<sup>66</sup> Dikki, B.E., Keynote Presentation to the Nigeria Investors' Summit" held in New York, United States of America, October 2013.

newspapers, oil palms, sugar refineries, oil refineries, telecommunications, ports, national facilities, and power generation and distribution companies.<sup>67</sup>

Encapsulated in these reforms therefore, were a receding role for the state and the ascendancy of the private sector and the market in the economic spheres. New legal and regulatory frameworks were developed and implemented in the telecommunications, financial, pensions, concessions and electric power sectors. In addition, at present there are executive Bills in the National Assembly geared towards instituting new legal and regulatory frameworks in the oil and gas, transportation (road, rail, ports, harbours and waterways) and postal sectors, including a legal framework for competition and consumer protection law that could fundamentally reshape the economic direction of the country.

### **1.5 Statement of the Problem**

Prior to the above reforms, government was owner/investor, operator/manager, and regulator of substantial institutional and infrastructural assets in the SOEs representing over 90% per cent of Nigeria's infrastructure. All these roles were fused into one. As owner/investor, government appointed and controlled the boards and management of these SOEs and exercised property rights in them. As operator/manager, it made investment, production, procurement, distribution and personnel decisions. As regulator, it determined the technical standards of products and services and their prices.

With privatisation, however, government withdrew substantially from the role of producing and delivering services and building infrastructure, and assumed the new dual role of enabling and regulating.<sup>68</sup> Ownership of the SOEs shifted from the public to the private sector. Two fears arose as a result of this shift in ownership. There were

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<sup>67</sup> Bureau of Public Enterprises website, Concluded Transactions accessed on 19/03/15 at 1.32pm <http://www.bpeng.org/sites/bpe/concluded%20transactions/Pages/default.aspx>.

<sup>68</sup> Dikki, note 66.

concerns from government and consumers that these erstwhile public monopolies could transform themselves into private monopolies with the attendant monopolistic distortions in the economy. The private sector was also wary of making long term investment decisions as a result of past policy inconsistencies and commitment to reform by government arising from fears for the security of their investments. Designing a new regulatory framework to address the above fears and concerns became a priority.

In order to address these concerns and fears, a new governance and “regulatory template”<sup>69</sup> in the form of Independent Regulatory Agencies (IRAs) was introduced. Its purpose was to superintend over the differing and often conflicting roles and interests of the state, the investor, and the consumer in the value chain. This institutional innovation was an integral part of a package of reforms that tied loans, aid and grants to the fulfilment of “conditionalities” that were prescribed by intermediating agencies before a country could benefit from their financial aid. Nigeria being a candidate country that had applied for financial assistance from the Intermediating Agencies was obliged to implement these “conditionalities”.

The introduction of the IRA model raises major legal tensions in the context of developing economies such as Nigeria. These relate to the appropriateness of the model in the light of institutional weakness prevalent in emerging democracies such as Nigeria, given the ingredients that have aided the success of IRAs in developed economies.<sup>70</sup> A background study of political economies of the USA and other matured economies where the IRA model has taken root shows that certain basic ingredients are institutional prerequisites for a credible, legitimate and effective IRA regime. These include:

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<sup>69</sup> Kessides, I.N., *Reforming Infrastructure: Privatization, Regulation and Competition*, A World Bank Policy Research Report, 2004, A co-publication of the World Bank and Oxford University Press at 80.

<sup>70</sup> Eberhard, A., *Infrastructure Regulation in Developing Countries: An Exploration of Hybrid and Transitional Models*, 2007, No 4, PPIAF Working Paper at 2.

- a) a rule of law regime that encapsulates the separation of powers, norms and laws; property rights and contract laws that rely on an independent judiciary to arbitrate, enforce and protect principles of fairness;
- b) functioning political, administrative and economic institutions;
- c) buoyant credit markets that sustain and support borrowing, raising capital, and attracting foreign capital;
- d) the containment of corruption; and
- e) the employment of professional staff, trained in the relevant fields of economics, accounting and law.<sup>71</sup>

Juxtaposing the above prerequisites with the Nigerian situation, however, it is clear that there was no attempt to adapt the model of the IRA to her peculiarities. The institutional endowments of Nigeria fall far short of the basic ingredients listed above. Nigeria's post - independence governance has been dominated military rule characterised by command and control structures that abridged the rule of law and separation of power concepts and did not allow democracy, due process and openness to thrive.<sup>72</sup> The present democratic experiment is still nascent and weak. Key institutions that guard and promote the rule of law, accountability, and openness are in their infancy. Furthermore, the subversion of the Rule of Law and constitutionalism in most of Nigeria's existence has encouraged an insidious culture of impunity and corruption that has corroded and undermined virtually all the structures whose existence is critical to the thriving of IRAs.

The pertinent question therefore, is whether these fragile institutions that have been weakened and undermined through decades of authoritarianism and corruption have the capacity to nurture and sustain the IRA model in Nigeria.

To put it another way, is the adoption of the IRA model into Nigeria without regard to her cultural, legal, institutional and political endowments not simply a case of

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<sup>71</sup> Kessides, note 69 at 80; Brown, A.C., *Infrastructure: The Regulatory and Institutional Dimension*, [www.hks.harvard.edu/hepg/.../ABrown\\_UNCTAD60110%20, 2\)](http://www.hks.harvard.edu/hepg/.../ABrown_UNCTAD60110%20,2) at 22.

<sup>72</sup> Ibid at 22.

“plug and play”?<sup>73</sup> Considering the presumptuous manner in which the IRA model was pushed through by the intermediating agencies, is there any room for a consideration of the very likely occurrence of “organ rejection” by the patient?

### **1.6 Objectives of Research**

Several legal issues are raised about the IRA model that demand an objective evaluation. It must be objective because this regulatory template was hastily adopted from developed economies, without first interrogating its essential attributes and outcomes. Neither was any thought given to adapting it to the political and institutional characteristics of a developing country such as Nigeria.<sup>74</sup>

1. A consideration whether or not the IRA model is the best framework for addressing the challenge of the transition from public to private ownership of utilities in Nigeria, and indeed in similar developing economies, is needed. A legal interrogation is desirable as to whether the IRA model is a case of “one size fits all” or whether there may be other models, be they substantive or hybrid, which seeks to address the unique contextual circumstances of developing economies such as Nigeria.
2. The IRA model has been instituted in other developing countries including Nigeria in the past decade or so and the jury is still out on whether or not it can be considered “the best” answer in addressing the infrastructure deficits facing such countries. The record has been mixed with discouraging developments in many sectors and countries.<sup>75</sup> A comparative inquiry as to its performance in places outside its natural habitat, the Western world, would be productive in determining its suitability or otherwise in the context of countries with weak institutions and immature economies.

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<sup>73</sup> Investment Climate Advisory Services of the World Bank Group, *Regulatory Governance in Developing Countries*, 2007, Better Regulation for Growth at 10.

<sup>74</sup> Dubash, note 63 at 4-5.

<sup>75</sup> Ibid at 3.

3. Nigeria caught the international bug of liberalization in the eighties and has since then engaged in a spirited divestiture of erstwhile state monopolies spanning all the sectors of the economy.<sup>76</sup> As a direct consequence of this, government has in the past ten years established two IRAs. One is a telecommunications regulator (Nigerian Communications Commission) and the other, an electric power regulator (Nigerian Electricity Regulatory Commission). There are ongoing arrangements to set up IRAs in the oil, gas, postal, transport (to regulate road, rail, inland waterways, ports and harbours), and competition and consumer protection sectors. This study aims to investigate the performance of the IRAs instituted so far, in the light of the weak institutions and immature economic indices and indicate their appropriateness or suitability in Nigeria's cultural, constitutional, social and legal contexts.
4. Moreover, in view of the size of Nigeria's population of over 160 million, and its new status as the largest economy in sub-Saharan Africa, with a GDP of \$510 billion in 2013, displacing South Africa to second place with \$384 billion, this study would have far reaching beneficial consequences for other emerging economies in Africa.<sup>77</sup>
5. Presently such an investigation in scholarly form has not been undertaken in the Nigerian context and it is the expectation that its findings and outcome would provide a veritable window to inform and guide policy makers in Nigeria and other developing economies, especially in sub-Saharan Africa, as to "good fits", rather than simply transplanting "international best practices" into their economies. It is also hoped that this study will fill the yawning gap in the literature in this emerging but long neglected and understudied field and hopefully help to "find and regain the 'lost decade' of Africa of the 1980s."<sup>78</sup>

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<sup>76</sup> Bureau of Public Enterprises, note 68.

<sup>77</sup> Revised and Final GDP Rebased Results, National Bureau of Statistics, [www.nigerianstat.gov.ng](http://www.nigerianstat.gov.ng).

<sup>78</sup> Eberhard, A., *Regulation of Electricity Services in Africa: an Assessment of Current Challenges and an Exploration of New Regulatory Models*, A paper prepared for the World Bank Conference towards Growth

These are some of the issues that this research will examine, with a comparative consideration of models existing and emerging in like jurisdictions and economies around the world.

### **1.7 Scope of Research**

The research will trace the origin and rationale for the emergence of infrastructure regulation globally as an economic tool, and its introduction and diffusion in developing economies including Nigeria. The study will identify the substantial legal issues that are emerging as a result of the new regulatory regime. A tabulation and consideration of the institutional fragility of Nigeria will be undertaken and juxtaposed against prerequisites for credible, legitimate and effective regulation of infrastructure using the IRA model. A comparative voyage will be taken to two countries with cultures, economies and legal systems similar to Nigeria with a view to identifying the path of development, pitfalls and lessons to be learnt. This comparative research will focus on Brazil and Ghana, considering the similarities of the two nations' political economies to Nigeria and the lessons such comparisons portend. Finally the study will lead to informed extrapolations, conclusions and suggestions as to the way forward based on international best practices gleaned from the comparative work.

### **1.8 Disclosure of Personal Background That Motivated Research Interest**

I consider myself modestly well placed to conduct this research. I have, in the past eight years, served as the Head of Infrastructure Regulation within the Nigerian Bureau of Public Enterprises, the government reform agency charged with the direct responsibility of developing new policy directions and preparing draft legislations in all aspects of the commercialization and privatization program of government. In the process I have been a part of the team that has prepared draft legislative initiatives in the oil and gas, post, telecommunications, electric power, transportation, roads and

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and Poverty Reduction: Lessons from Private Participation in Infrastructure in Sub-Saharan Africa, June 6-7, 2005, Cape Town, South Africa. See also Meredith, note 31 at 368.



competition/consumer protection sectors; all tailored after the economic prescriptions of intermediating agencies.

My interest to interrogate the IRA model and its underpinnings has essentially arisen from sustained exposure to the conceptualisation, design, and setting up of IRAs in the telecommunications and electric power sectors and the mounting unease over its suitability for Nigeria, given the huge institutional fragility and hostile soil in which the model is expected to germinate, grow and thrive.

### **1.9 Methodology**

This research will focus on doctrinal and non-doctrinal imperatives. A consideration of the theoretical state and development of the concept of regulation will be explored. On a non-doctrinal platform, however, a systematic exposition of the responses to regulation by emerging economies and its impact thereon will be attempted. Both primary and secondary sources of materials will be used. The non-doctrinal investigation will draw on my personal experiences and exposure in the course of the past eight years in infrastructure regulation management and the challenges and insights encountered and gained. Intimate knowledge and competencies gained in the course of work will serve as a research source and tool. In addition, copious reference will be made to constitutions, legislative enactments, rules and conventions and protocols, textbooks, journals, magazines and articles.

### **1.10 Conclusion**

With the above background of the economic path of Nigeria since the colonial era to the present, and considering the changes in ownership of infrastructure and services in the past three decades that gave rise to the need for regulation and the institution of IRAs, Chapter 2 will trace the origin and rationale for the emergence of IRAs as a mode of governance in the United States of America (USA) and the reasons for its subsequent spread to Europe and then the developing world, including Nigeria, in the past three decades.

Chapter 3 will dwell on the institutional fragility and weaknesses in the structure of the political, judicial, legislative and electoral institutions and the entities that support them.

Chapter 4 will analyse the state of economic, financial, law enforcement and capacity building institutions in Nigeria and their impact on the IRA model of regulatory governance.

Chapter 5 articulates the challenges facing Nigeria in the quest to surmount the rule of law requirements for the entrenchment of the IRA model.

Chapter 6 will undertake a review of the performance of the IRAs in two countries, Brazil and Ghana, which share similar political economies and developmental features with Nigeria, weighing their scorecard against the record of IRAs in Nigeria.

Chapter 7 will revisit the major challenges facing the IRA model in Nigeria, articulate the major findings and propose hybrid models of regulatory governance that draws from the ideas and principles of the IRA model; moderating them with local peculiarities whilst ensuring that legitimate and credible regulation is not compromised.

## CHAPTER 2

### ORIGIN AND RATIONALE FOR THE GLOBAL SPREAD OF INDEPENDENT REGULATORY AGENCIES

#### 2.1 Introduction

This chapter traces the origin and rationale for the emergence of Independent Regulatory Agencies (IRAs) as a mode of governance in the provision of infrastructures and services in the United States of America (USA) and the reasons for its subsequent spread to Europe, the developing world and then Nigeria in the past three decades.

This thesis noted in Chapter 1 that until the past three decades, the state was the predominant provider of infrastructures, goods and services especially in developing countries. This was justified for a number of reasons including the lack of a private sector willing to commit to long term investments in infrastructure whose return on investments were slow; the need to correct economic imbalances that private monopolies attract; and the desire to stimulate rapid economic growth. Furthermore for most of the newly independent nations like Nigeria, there was the compelling argument of fostering “industrial democracy” among disadvantaged groups on the fringes of society.<sup>1</sup> The underlying reason for this overarching role of the state was the assumption that state ownership would enhance government’s ability to regulate the economy in a manner to protect the public interest. As a result governments became major actors in economic activities utilising State Owned Enterprises (SOEs) as a vehicle to achieve these aims.

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<sup>1</sup> Majone, G., *The Transformation of the Regulatory State*, Osservatorio sull’Analisi di Impatto della Regolazione, [www.osservatorioair.it](http://www.osservatorioair.it), settembre 2010; Ajakaiye, D.O., *Impact of Public Policy on Public Enterprises Performance in Nigeria*, Nigerian Journal of Economic and Social Studies, Vol.26, No. 3 in Obadan, M.I and Ayodele, A.S, *Commercialization and Privatisation Policy in Nigeria*, National Center for Economic Management and Administration, Ibadan, 1988; Guseh,J.S., *The Public Sector, Privatization, and Development in Sub-Saharan Africa*, *African Studies Quarterly* | Volume 5, Issue 1 | Winter 2001.

However the SOEs were unable to attain the goals for which they were established. Their poor performance impacted negatively on the provision of infrastructures, goods, and services. They also constituted a major drain on the national treasury.<sup>2</sup> The failure of public ownership favoured the evolution of a different model of governance in which government would cede ownership of the infrastructures, utilities and services to the private sector under a new legal and regulatory regime. This new regime would be enforced by specialised agencies on the basis of a specific legislative mandate. Such agencies would be created by legislation, thus making the legislature their principals, and be made independent to operate outside the hierarchical control or oversight by the line ministries or departments of the Executive.<sup>3</sup>

## **2.2 Entry of the IRA Model of Regulatory Governance onto the Global Stage**

The IRA model was born in the United States of America (USA) in 1887<sup>4</sup> with the enactment of the Interstate Commerce Act. With it, the USA Congress relinquished, through delegation, its power to regulate interstate railway traffic (a core state function undertaken by Congress since inception), to the Interstate Commerce Commission (ICC) referring to it as an Independent Regulatory Agency. The essence of this delegation was to create a referee-like agency to balance the conflicting interests of investors and consumers in the economic value chain.

This institutional innovation of IRAs in the USA case was also to moderate and balance the interests of investors and consumers of services by ensuring the provision of quality-based services and cost-reflective prices; thus creating a win-win situation for every party in the value chain.” The ICC was vested with significant legislative,

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<sup>2</sup> Ajakaiye, note 1; Nwoye M.I., *Privatization of Public Enterprises in Nigeria: The Views and CounterViews*. Globalizacija : Journal for Political Theory and Research in Globalization, Development and Gender Issues, Women Center for Democracy and Human Rights, Serbia and Montenegro, 2005 at 3.

<sup>3</sup> Thatcher, M., *Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation*, West European Politics, Vol. 25, No. 1 (January 2002) 125 – 147 at 125; Majone, note 1.

<sup>4</sup> Ibid at 6.

executive and adjudicative powers in addition to possessing financial and administrative independence. It was at liberty to determine how to conduct their business, and to decide the processes to utilise in fulfilling its mandate. In addition, the ICC was generally not required to get the consent of another government agency before taking its decisions. Its funding streams were derived from the fees and charges on regulated industries operating within its regulatory space.<sup>5</sup>

This development strained the constitutional theory of separation of powers and created major legal and constitutional tensions in the USA.<sup>6</sup> It was strenuously argued that the delegation of powers by Congress to the ICC subverted the entrenched doctrine of separation of powers that was intrinsic in the USA model of political governance. Congress was accused of undermining the Constitution by creating a “fourth branch of government”, a novelty not envisaged by the framers of the Constitution.<sup>7</sup>

These challenges were linked to Article 1 of the USA Constitution which provides that “All legislative Powers herein granted shall be vested in a Congress of the United States...” For most of USA political history, the three arms of government - the legislature, the executive and the judiciary - have each had a distinct and defined field of coverage. Congress has powers to make laws, subject to a veto from the President which could be overridden by Congress. The President is vested with powers of implementing those laws while the third arm, the Judiciary, is charged with the responsibility of interpreting the laws.<sup>8</sup> This constitutional arrangement, encapsulated under the separation of powers concept, ensures that no arm overreaches the other and in turn this inhibits arbitrariness and tyranny while at the same time securing the liberty

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<sup>5</sup> Brown, A.C., *Infrastructure: The Regulatory and Institutional Dimension*, visited on November 1, 2013 at [http://www.hks.harvard.edu/hepg/Papers/2010/ABrown\\_UNCTAD60110%20\(2\).pdf](http://www.hks.harvard.edu/hepg/Papers/2010/ABrown_UNCTAD60110%20(2).pdf).

<sup>6</sup> Schoenbrod, D., *Power Without Responsibility, How Congress Abuses the People Through Delegation*, Yale University Press, 1993 at 30-31; Strossen, N., *Delegation as a Danger to Liberty*, Cardozo Law Review Vol.20:861 (1999); *Winthrop v. Larkin* 421 U.S. 35 (1975 ) 1532.

<sup>7</sup> Majone, note 1 at 6; Vasconcellos, R.A.L., *Brazilian Regulatory Agencies: Future Perspectives and The Challenges of Balancing Autonomy and Control*, School of Business and Public Management, The Institute of Brazilian Business & Public Management Issues, The George Washington University, December, 2009

<sup>8</sup> Article 2, Section 1 vests the executive powers in the President while Article 3, Section 1 vests the judiciary powers in the Supreme Court and other courts to be so designated by Congress.

of the citizenry. This position had been maintained for well over a hundred years after the adoption of the Constitution, with the Supreme Court holding stoically to the position that the Constitution denied Congress the right to delegate to others their constitutionally-vested power of enacting laws.<sup>9</sup>

In time, however, the pendulum began to swing in favour of delegation of legislative powers to IRAs. Geradin<sup>10</sup> notes that the new direction of the courts was informed by the persuasiveness of the argument that the legislative powers of Congress under Article 1 were not held exclusively and could be shared with others and that delegation of such powers to federal agencies did not amount to an infringement of the constitutional doctrine of Separation of Powers.<sup>11</sup> The only caveat was that the delegation must be accompanied by clear-cut policy objectives and directives from the Legislature embodied in a basic law, which the independent agencies would be required to implement.<sup>12</sup> In Wayman Vs Southard<sup>13</sup>, Chief Justice John Marshall in distinguishing between “important subjects” and “mere details” held that “a general provision may be made, and the power given to those who are to act under such general provision, to fill up the details.” Furthermore in Mistretta Vs United States<sup>14</sup>, the U.S. Supreme Court applied the “intelligible principle” test. The Court deemed it

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<sup>9</sup> Schoenbrod, note 6 at 30-31; *See*, *Washington v. W.C. Dawson*, 264 U.S. 219 (1924) (affirming the decision of *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), which held that Congress could not delegate to states the application of state worker compensation laws in admiralty cases); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) (striking down a statute that made it a crime to charge “unjust or unreasonable” prices for “any necessities” as unconstitutional because it delegated legislative power to courts and juries); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) (striking down a statute that instructed federal courts to apply state worker compensation law in resolving admiralty cases). *See also* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>10</sup> Geradin, D., *The Development of European Regulatory Agencies: Lessons from the American Experience*, In Geradin, D., R. Munoz and N. Petit (eds.) *Regulation through Agencies in the EU. A new paradigm of European governance*, Cheltenham: Edward Elgar, at 220.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid* at 220.

<sup>13</sup> 23 U.S. 10 *Wheat*. 1 1 (1825) (USA).

<sup>14</sup> 488 U.S. 361 (1989) (USA).

“constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”<sup>15</sup>

The softening of the above position by the courts allowed for a widening of the scope of delegation of powers from the legislature to IRAs. In 1914 the Federal Trade Commission (FTC) was established soon to be followed by the Agricultural Adjustment Act in 1933.<sup>16</sup> These developments served to legitimize, entrench and further situate law-making; executive and adjudicative powers into IRAs created by Congress but located within the executive arm of government. This change in legal direction was reinforced by the Supreme Court in Winthrop v. Larkin.<sup>17</sup> In that matter, the court held that situating all the powers of law-making, implementation and adjudication in one agency (IRAs) was not unconstitutional unless the presumption of honesty and integrity of officers exercising the functions is overcome by evidence of actual bias or prejudice in a given case.

### **2.3 Delegation**

To have a proper understanding of the tensions the delegated authority by the legislature to the IRAs generated at the intersection of administrative and constitutional law in the USA, it is appropriate to expand the contending positions of its proponents and opponents. This elucidation is desirable, given the adoption of the IRA model in Nigeria without any legal and constitutional interrogation. More importantly the constitutional democracy in practice in Nigeria is similar to that of the USA. The language of the Nigerian Constitution on the powers of the three arms of the

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<sup>15</sup> Batista, T.C., *Control of the normative power of the regulatory agencies by the Judicial Branch*, George Washington University - School of Business, Center for Latin American Issues, The Institute of Brazilian Issues, The Minerva Program, Washington - DC, Spring 2014 at 13.

<sup>16</sup> The Agricultural Adjustment Act, Pub.L.No, 48 Stat. 31(1933) gave the Secretary of Agriculture the powers to regulate crop quality or other aspects of agriculture but the essential intent was to restrict supply. The “agricultural marketing orders” the Act empowered the Secretary to issue were in a 1935 amendment to the Act re-designated as “licences”.

<sup>17</sup> Winthrop v. Larkin 421 U.S. 35 (1975 ) 1532.

government<sup>18</sup> is similar to that of the USA Constitution. Hence, a discourse on the challenges of the delegation of legislative powers faced in the USA will illuminate the way forward for Nigeria.

### **2.3.1 Proponents of Delegation**

Proponents of the delegation of legislative powers to IRAs argue that it is not a blank cheque for them to do as they please. Rather, in delegating, the legislature first makes the “fundamental policy choices” in the legislation setting up the IRA and then goes ahead to delegate the power to implement the nitty-gritty of the policy thrusts to the IRA.<sup>19</sup> This enables the lawmakers to remove themselves from political and other vested interests in order to situate the powers of specifying the more detailed aspects (usually referred to as regulations) into the hands of experts within the IRAs who would base their decisions, not on any vested interests, but “upon a cool appraisal of the public interest.”<sup>20</sup> Even in the event that the experts succumb to any vested interests, processes enshrined in the legislation setting up the IRA stipulate that all parties must be heard and decisions arrived at in a transparent manner after a sombre consideration of all representations.

Another guarantee to forestall abuse of the delegated power by IRAs is the subjection of all their decisions to judicial appeal and review.<sup>21</sup> Where a party is aggrieved by the exercise of the powers by IRAs, courts of law are empowered to

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<sup>18</sup> 1999 Constitution of the Federal Republic of Nigeria: Section 4. (1) The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation, which shall consist of a Senate and a House of Representatives.; S. 5 (1) The executive powers of the Federation shall be vested in the President; S. 6 (1) The judicial powers of the Federation shall be vested in the courts.

<sup>19</sup> Schoenbrod, note 6 at 12-18.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid at 9.



intervene in order to determine the legitimacy and lawfulness of the processes leading up to the decision and the legality and validity of the decision itself.<sup>22</sup>

In a further justification for delegation, political scientists have relied on the Principal –Agency relationship to explain the reasons why the legislature is usually inclined towards delegating its powers to IRAs, whereas ordinarily it should be jealously guarding them.<sup>23</sup>

- a. Delegating powers of law-making to an agent can address concerns of the credibility of commitments. Legislators always work under the continued consciousness of electoral cycles and their decision-making processes always have a bearing to their fortunes at the polls. This does not augur well for credible commitments in the decision-making process but rather encourages short-termism. Delegating powers to an agency that does not have an eye on the electoral cycle helps to mitigate the lack of credible commitments.
- b. Delegation to expert teams or agencies allows government to optimize efficiency and the evolution of cost-effective policy options in the decision making processes, most especially in cases where the field concerned is highly technical in nature; and
- c. Sharing and shifting of blame for wrong or unpopular decisions is one of the cushioning effects of delegation as the legislators will have another convenient agency to point to as being responsible for an unpopular decision in order to appear popular to the electorate.

### **2.3.2 Opponents of Delegation**

Opponents of delegation, on the other hand, argue that allowing Congress to delegate its law-making powers to IRAs spells death to the concept of a constitutional democracy

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<sup>22</sup> Geradin, note 10.

<sup>23</sup> Thatcher, note 3 at 125.

as conceived by its founding fathers.<sup>24</sup> They assert that personal liberty, a key foundation upon which constitutional democracy is founded, would be subverted. This in turn would invalidate key democratic concepts such as separation of powers and rule of law upon which democracy rests.<sup>25</sup> Three reasons are furnished for this conclusion.<sup>26</sup>

Firstly, they argue that delegation undercuts liberty in a number of ways including shifting power from Congress to another arm of government, the executive, thus undermining the core concept of non-delegation. Delegation also allows Congress to parry blame for unpopular decisions made in the form of laws by experts running the IRAs, when in actual fact the blame ought to be that of Congress, as they were the ones elected by the people to make laws and not the experts within the IRAs. Further, as delegation makes the process of law-making easier and faster, it abridges public participation at hearings before laws are made by the legislature. The point has also been made that delegation concentrates law-making, enforcement and adjudication powers in the same hands, a development that runs contrary to the famous words of Madison that the “accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justify to be pronounced the very definition of tyranny”<sup>27</sup>

Secondly, it has been argued that by the nature of its evolution in the power architecture, IRAs lack democratic political legitimacy. Notwithstanding this, the powers they wield go to roots of the political economy of a nation and thus are of a political nature. The argument goes therefore that these political decisions are better left to be taken by public officials who have been chosen by the electorate and are

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<sup>24</sup> Lawson, G., *The Rise and rise of the Administrative State*, 107 Harv. L.Rev. 1231 1993-1994 at 1233 – 1249.

<sup>25</sup> Schoenbrod note 6 at 13-19.

<sup>26</sup> Strossen, N., *Delegation as a Danger to Liberty*, Cardozo Law Review)Vol.20:861 1999).

<sup>27</sup> The Federalist No 47, at 301 (James Madison) Clinton Rossiter ed., 1961 in Lawson, G., *The Rise and rise of the Administrative State*, 107 Harv. L.Rev. 1231 1993-1994 at 1248.

answerable to the latter unlike the experts within the IRAs who are independent of everyone.<sup>28</sup>

Thirdly, it has been contended<sup>29</sup> that business incorporates galvanising, generating, producing and distributing resources and should be consigned to the hands of private persons working under and within the promptings of competitive markets. Any government role, both as owner, manager or regulator, is interventionist and should be avoided. The state should confine itself to the rudimentary role of assuring and protecting property rights.<sup>30</sup> This argument derives its strength from the rationale for the emergence of regulation in the first place; government's desire to develop and maintain arm's length relationships with all participants in the market place.

Notwithstanding the legal, administrative and constitutional mistrust of delegation to IRAs, it has come to be recognized and accepted in constitutional and administrative law realms.<sup>31</sup>

What has emerged from the above is that the role of the state in contemporary life has been completely transformed. Its erstwhile role as the owner and manager of heavy industries and infrastructure and the provider of economic and social goods and services has been traded in for a more sublime one of a rule-maker and regulator. Even with that, the performance of these roles has been consigned to a multiplicity of IRAs cutting across different sectors, and functioning independently of its principals, the legislature and the executive. This state of affairs has been rightly called the "regulatory

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<sup>28</sup> Yeung, K., *The Regulatory State* in *The Oxford Handbook of Regulation*, eds. Baldwin, et al, Oxford University Press, 2010.

<sup>29</sup> Barton, B., *The Theoretical Context of Regulation*, in *Regulating Energy and Natural resources*, eds., Barton, et al Academic Advisory Group, Section on Energy, Environment, Natural Resources and Infrastructure Law, International Bar Association, 2006, Oxford University Press at 17.

<sup>30</sup> Ibid at 18.

<sup>31</sup> Ibid.

state” with several scholars<sup>32</sup> holding the view that we all live in the “golden age” of the regulatory state.

Having explored the rationale for the emergence of the concept of independent regulation and IRAs in the land of their birth, the USA, an exploration of the reasons for its “homecoming and enthusiastic reception in Europe and the rest of the world”<sup>33</sup> will be undertaken. The rapidity of its spread, on a much larger scale than even in the USA,<sup>34</sup> calls for an intellectual inquiry.

## **2.4 Spread of the IRA Model to Europe**

Unlike the USA where the dynamics of the emergence and impact of regulation of utilities and the IRA model on the body politic was debated and situated firmly within the contours and peculiarities of American public policy, administration and constitutional democracy, this did not occur in Europe. The model did not gain traction until the 1970s, over a century after its creation in the USA. Majone<sup>35</sup> maintains that before 1978, terms such as “deregulation” and “privatisation” were hardly heard in the UK, the then declining industrial powerhouse of Europe. The public sector continued to provide leadership in the provision of infrastructures and services.

Thus the regulatory state dawned on Europe late but spread rapidly in the course of the last three decades. In France for example, there were only five entities <sup>36</sup>

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<sup>32</sup> Majone G., *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 1997, *Journal of Public Policy*, 17(2), 139-167; Loughlin, M. and Scott, C. *The regulatory state* in Dunleavy, P., Gamble, A., and Holliday, I. (eds), 1997, *Developments in British Politics* (Basingstoke: Macmillan).

<sup>33</sup> Levi-Faur, D., *The Odyssey of the Regulatory State. Episode One: The Rescue of the Welfare State*, Jerusalem Papers on Regulation & Governance, Working Paper No. 39, November 2011 at 14.

<sup>34</sup> Brown, B., *The Theoretical Context of Regulation*, in *Regulating Energy and Natural Resources*, Barry Brown, et al, eds., Academic Advisory Group, Section on Energy, Environment, Natural Resources and Infrastructure Law, International bar Association, Oxford University Press, 2006 at 11.

<sup>35</sup> Majone, note 1.

<sup>36</sup> Commission Nationale de l'Informatique et des Libertés; the Commission de Contrôle des Banques created in 1941 and transformed into the Commission Bancaire by the law of 24 January 1984; the Commission des Opérations de Bourse (1967), whose powers have been significantly extended by the law

that possessed independent regulatory features in 1978 but presently there are up to twenty IRAs in existence.<sup>37</sup> In the United Kingdom, nine such entities came into existence between the 1970s and 1990s.<sup>38</sup>

While the rise of IRAs in the USA was a reaction to the failure of the state-centred economic model, this was not the main reason for its emergence in Western Europe. Research by Thatcher identifies two broad themes that explain the acceptance of the IRA model in Europe.

These are the functional and contextual themes<sup>39</sup> and this categorisation has received scholastic acceptance.<sup>40</sup>

Under the functional theme, the reasons given for the emergence of IRAs in Western Europe included the inclination of elected officials to use delegation to IRAs to shift blame in the event of a backlash that may occur as a result of implementing harsh but much needed reforms; the highly complex and technical nature of regulation arising from new technological developments that called for a high degree of expertise and knowledge that only expert teams can handle; and the huge volume of information that is needed to be assembled, dissected and filtered before an informed regulatory decision can occur, a task that cannot be easily done by a legislative committee.

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of 2 August 1984; the Commission des Infractions Fiscales (1977); the Commission des Sondages (1977); the Mediateur (1973), the only single-headed regulatory agency created so far in France. Culled from Marie-Jose Guedon, *Les Autorites Administratives Independantes* (Paris: Librairie Generale de Droit et de Jurisprudence, 1991) in Majone, note 1.

<sup>37</sup> Marie-Jose Guedon, *Les Autorites Administratives Independantes* (Paris: Librairie Generale de Droit et de Jurisprudence, 1991) in Majone, G., *The Rise of the Regulatory State in Europe*, West European Politics 17.3 (1994):77, July 1994. World History in Context. Web. 26 Dec 2013.

<sup>38</sup> The Independent Broadcasting Authority (1972), the Civil Aviation Authority (1972), the Health and Safety Commission (1974), the Equal Opportunities Commission (1976), and the Commission for Racial Equality (1976) are only some of the regulatory bodies created in this period; Office of Telecommunications (1984), Office of Gas Supply (1986), Office of Water Services (1989), Office of Electricity Regulation (1990). Culled from Robert Baldwin and Christopher McCrudden, *Regulation and Public Law* (London: Weidenfeld, 1987) in Majone, note 1.

<sup>39</sup> Thatcher, note 3 at 125-147.

<sup>40</sup> Majone, G., *Regulation and Its Modes: the European Experience*, International Journal of Public Administration, Volume 19, Issue 9, 1996; Cetin, T. et al, *Independent Regulatory Agencies in Turkey and Their Formal Independence Levels* <http://ecs.epoka.edu.al/index.php/icme/icme2008/paper/viewFile/11/6>; Majone, note 1.

Other reasons for the rapid spread of IRAs in Europe included the desire to short-circuit “short-termism” that characterises decisions of elected legislators that typically lack enduring commitments given their constant eyes on electoral cycles;<sup>41</sup> and the increased regulation by international/supranational agencies such as the European Union who required member-states to domesticate and implement the IRAs for uniformity and ease of cross-national regulation.

The contextual reasons identified for the spread of IRAs in Western Europe included “policy learning and institutional mimetism.” This is where a country sets up a model of an agency and it thrives, countries close to it watch and copy it into their domains. One example was the creation of the USA model of Federal Communications Commission in 1934 that gave impetus to the setting up of OFTEL in the UK, which in turn triggered the proliferation of regulators in the same mould within Europe under what has been termed the “snowball effect.”<sup>42</sup>

With particular reference to the spread of IRAs in Central and Eastern Europe some other reasons account for this. The first was that Central and Eastern European countries came under sustained pressure from intermediating agencies to institute IRAs as a condition for receiving the financial assistance they desperately required to stabilise their ailing economies.<sup>43</sup> Secondly, the desire of these countries to join the European Union (EU) required them to become compliant with relevant EU directives on the IRA model of regulatory governance. Thirdly, additional pressure came from USAID which was then handing out most of the development aid.<sup>44</sup> This came in subtle and in some cases brazen form, with USAID working either alone or in collaboration with

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<sup>41</sup> Majone, note 1.

<sup>42</sup> Magnette, P., *The Politics of Regulation in the European Union*, in *Regulation Through Agencies in the EU, A New Paradigm of European Governance*, Geradin, D. et al, eds, 2006, Edward Elgar Publishing Limited.

<sup>43</sup> Stern, J., *Styles of Regulation: The Choice of Approach to Utility Regulation in Central and Eastern Europe*, Regulation Initiative Working Paper Series, 1999, Number 34, London Business School, London & NERA at 2.

<sup>44</sup> Ibid.

intermediating agencies, which engaged consultants and facilitated workshops and seminars in the region to pointedly advocate the USA style of regulation.<sup>45</sup>

## 2.5 Emergence of IRAs in Nigeria

As depicted in the first chapter, the spike in international oil prices, the downgrade of the Keynesian model of economic governance to one that is market-driven, the attendant fall of the Soviet Union, fiscal constraints, a debt overhang, inefficiency in the production and delivery of services by SOEs, corruption and the poor state of political and economic institutions are frequently cited as some of the reasons for the emergence of IRAs in Nigeria.<sup>46</sup>

However, the immediate trigger that led to the reception of the IRA model in Nigeria was the desire to alleviate the economic problems the country was facing. To do this, the government applied to the International Monetary Fund (IMF) for a three year extended facility loan of US\$2.3billion.<sup>47</sup> In order to benefit however, the IMF, consistent with its policies in other debt-ridden African countries,<sup>48</sup> required Nigeria to institute a menu of economic reforms that included cost reflective tariffs for utilities, reducing government expenditure, privatising SOEs, removal of government subsidies and price controls, and devaluing the naira.<sup>49</sup>

Negotiations between government and the IMF dragged on and eventually stalled principally on account of the insistence by the government that the 17 conditionalities given by IMF were too draconian.<sup>50</sup> The new military government

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<sup>45</sup> Aliff, G, and Branko, T., *Why U.S. public utility commission style ratemaking has become a hit overseas*, in *Global Regulation: Exporting America to the World*, Public Utilities Fortnightly, February 2007.

<sup>46</sup> Falola, T and Heaton, M.M, *A History of Nigeria*, 2008, Cambridge University Press, at 203-204.

<sup>47</sup> Anyanwu, J. C., *President Babangida's Structural Adjustment Programme and Inflation in Nigeria 1992*, *Journal of Social Development in Africa*, Vol.7 No.1 at 5-6.

<sup>48</sup> Meredith, M., *The State of Africa, A History of Fifty years of Independence*, The Free Press, London, 2005.

<sup>49</sup> Falola and Heaton, note 46 at 216.

<sup>50</sup> Anyanwu, note 47.

pandered to public opinion and subjected the debate and negotiations to a public referendum which returned a negative verdict.<sup>51</sup>

Despite its rejection, government went ahead to institute wholesale fiscal and regulatory reforms in 1986. Though the reforms were home-grown, they were patterned after the intermediating agencies' specifications. This included the implementation of a Structural Adjustment Programme (SAP) which was aimed at restructuring the economy and making it more competitive and efficient.<sup>52</sup>

Encapsulated in the SAP<sup>53</sup> was the deregulation and liberalisation of the economy through privatisation of SOEs and the delineation of regulation, policy and commercial roles. While government would continue to determine policy matters, regulatory and commercial roles were excised from government to IRAs and the private sector respectively. The requirement for the setting up of IRAs was meant to balance the conflicting and often contending interests of the new value chain of the state, the consumer and the investor.

Thus the era of the regulatory state had dawned on Nigeria, irreversibly affecting the constitutional, legal, administrative and economic face of the nation. Within a short span of less than three decades, the Nigerian political and economic landscape had become overwhelmed with a range of foreign ideas, policies and institutional innovations, encapsulated in the IRA model of regulatory governance in a variety of industries and utilities, cutting across different sectors of the economy. Unlike the USA where there was a sustained process of legal and constitutional interrogation of the model, none took place in Nigeria. This could be explained by the fact the first waves of

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<sup>51</sup> Falola and Heaton, note 46.

<sup>52</sup> Adeyemo D.O, *Public Enterprises Reform in Nigeria: A Review*; Kamla-Raj 2005 J. Soc. Sci., 10(3): 223-231 (2005); The detailed undercurrents that led to the SAP program are covered by Thomas Callaghy in *Lost Between State and market: The Politics of Economic Adjustment in Ghana, Zambia and Nigeria*, in Joan Nelson, ed., *Economic Crisis and Policy Choice*, Princeton University Press, 1990 at 305 – 7.

<sup>53</sup> Olutayo, A and Omobowale, A., *Capitalism, Globalisation and the Underdevelopment Process in Africa: History in Perpetuity*, Council for the Development of Social Science Research in Africa, 2007 *Africa Development*, Vol. XXXII, No. 2, 2007, 97-112 at 105-106.



IRAs were during the military era, when the legislative and executive powers fused in one arm, and the military regime had a zero tolerance for opposing viewpoints.

Table 1 contains a list of regulatory agencies in Nigeria and indicates how comprehensively the IRA model has taken root in Nigeria within a short time. The concept of “agencification” which is embedded in the IRA model of regulatory governance has been the guiding spirit behind the evolution and institutional structure of all these regulatory agencies. Table 1 contains three types of regulatory agencies.

The first category is those agencies that meet the conceptual ideals of IRAs and function as such, within the context on an enabling law. These agencies are reflected as Table 1A. This thesis focus on the two IRAs reflected as Numbers 2 and 3 in Table 1A.

The second category is made up of agencies that regulate aspects of the Nigeria’s social-economic life, but do not, by their institutional characteristics, meet the precise contours of an independent regulatory agency model. They are essentially extra-government agencies that report to the line ministries in the course of carrying out their functions. Agencies reflected to in Table 1B belong to this group.

The third category is made up of proposed regulatory agencies that have been designed and presented to the National Assembly as executive bills for passage into law. These are reflected in Table 1C. When passed into law, these agencies will belong to the first category and they are fashioned to operate as IRAs.

**TABLE 1A**

<b>S/N</b>	<b>Sector</b>	<b>Agency</b>	<b>Commencement</b>	<b>Regulatory Space</b>
1	Financial Services	Central Bank of Nigeria - Enabling Law - <b>Banks and Other Financial Institutions Act, 1991</b>	1991	Banking - Commercial, Mortgage, Merchant, Micro & Medium, Bureau de Changes
2	Telecommunications	Nigerian Communications Commission - Enabling Law: <b>Nigerian Communications Act, 2003</b>	2003	Regulation of Telecommunications
3	Electric Power	Nigerian Electricity Regulatory Commission- Enabling Law : <b>Electric Power Sector Reform Act, 2005</b>	2005	Regulation of the Generation, Transmission, Distribution and Sale of electric power

TABLE 1B

S/N	Sector	Agency	Year of Establishment	Regulatory Space
1	Insurance	National Insurance Commission - Enabling Law: <b>National Insurance Commission Act, 1997</b>	1997	Regulates and supervises the Nigerian Insurance Sector
2	Food & Drugs	The National Agency for Food and Drug Administration and Control - Enabling Act: <b>National Agency for Food and Drug Administration and Control Act, 1993</b>	1993	Regulation of drugs, food and other regulated products are manufactured, imported, exported, advertised, distributed, sold and used.
3	Environment Pollution	The National Environmental Standards and Regulations Enforcement Agency - Enabling Act : <b>National Environmental Standards and Regulations Enforcement Agency Act, 2007</b>	2007	Protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology
4	Infrastructure Concession	Infrastructure Concession regulatory Commission - Enabling Law : <b>Infrastructure Concession Regulatory Commission Act, 2005</b>	2005	To take custody of concession agreements made under this Act and monitor compliance with the terms and conditions
5	Stock, Securities and Exchange	Securities and Exchange Commission - Enabling Law : <b>Investment and Securities Act, 2007</b>	2007	Regulation of Investment and Securities business

6	Broadcasting	National Broadcasting Commission - Enabling Law : <b>National Broadcasting Commission Act, 1992</b>	1992	Regulation of Radio, Television and Satellite Communications
7	Upstream Petroleum	Department of Petroleum Resources- Set up as an extra-Ministerial Department of the Federal Ministry of Petroleum Resources	1988	Regulation of the Upstream Sector of the Petroleum Industry
8	Downstream Petroleum	Petroleum Products Pricing Regulatory Agency - Enabling Law : <b>Petroleum Products Regulatory Agency (Establishment) Act, 2003</b>	2003	Regulate pricing and distribution of refined petroleum products
9	Air Transportation	Nigerian Civil Aviation Authority- Enabling Act : <b>Civil Aviation Act, 2006</b>	2006	Regulation of air transportation and navigation
10	Public Procurement	Bureau of Public Procurement - Enabling Law - <b>Public Procurement Act, 2007</b>	2007	Regulation of pricing standards and benchmarks for public procurement
11	Entertainment – Films, Videos	National Film and Video Censors Board - Enabling Law : <b>National Film and Video Censors Board, 1993</b>	1993	Regulation of Films and Videos
12	Consumer Protection Council of Nigeria	Consumer Protection Council of Nigeria - Enabling Law : <b>Consumer Protection Council Act, 1999</b>	1999	Providing redress to consumers complaints
13	Pensions	National Pension Commission - Enabling Law : <b>Pension Reform Act, 2004</b>	2004	Regulation of contributory pension schemes

14	Copyright and Patents	Nigerian Copyright Commission - Enabling Law : <b>Nigerian Copyright Commission Act, 1970</b>	1988	Regulating Copyright matters
15	Maritime	National Maritime Administration and Safety Agency - Enabling Act : <b>Nigerian Maritime Administration and Safety Agency Act, 2007</b>	2007	Regulation maritime safety, security, marine pollution and maritime labour.
16	Nuclear Safety	Nigerian Nuclear Regulatory Authority- Enabling Law - <b>Nuclear Safety and Radiation Protection Act, 1995</b>	1995	Regulation of nuclear safety and radiological protection

Source: Generated by Author

TABLE 1C

S/N	Sector	Agency	Year	Regulatory Space
1	Covers all sectors of the economy	Competition & Consumer Protection Commission	Undergoing legislative consideration	Competition and Consumer Protection across all sectors
2	Transportation (Land, Rail, Maritime and Waterways)	National Transport Commission		Economic Regulation of the land, waterways and maritime transportation modes
3	Postal	National Postal Commission		Regulation of the Postal sector

Source: Generated by Author

Pertinent questions to be tackled are: what led to the rapid assimilation of the IRA model into Nigeria? How can it be understood? What have been the dynamics that underpinned its infiltration into different sectors in such a seamless manner? What led policy makers, who since political independence had been implementing a state-led economic model complete with monolithic monopolies, to suddenly switch over to the IRA model? The following seeks to provide answers to the questions.

As is evident from the large body of literature, the spread of IRAs across the developed world has received much scholarly investigation since its debut, but similar studies relating to the developing world are lacking. Exceptions are some work on Latin American countries by Levi-Faur in 2003,<sup>54</sup> Jordana and Levi-Faur in 2005<sup>55</sup>, work relating to Egypt by Ahmed Badran<sup>56</sup> which addressed only the telecommunications sector, and a paper by Sosay Gul and Unal Zenginobuz,<sup>57</sup> dwelling on emerging economies in some Latin American countries, Asia and Central and Eastern Europe. There are also three articles authored by Aryeetey and Ahene, Kapika and Eberhard and Aryeetey<sup>58</sup> that treat the legal and regulatory framework for infrastructure provision in Ghana, without addressing the question of institutional limitations of the

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<sup>54</sup> Levi-Faur, D., *The Politics of Liberalisation: Privatisation and Regulation-for- Competition in Europe's and Latin America's Telecoms and Electricity Industries*, 2003, *European Journal of Political Research*, 42, pp. 705-740.

<sup>55</sup> Jordana, J., and Levi-Faur, D., *The Diffusion of Regulatory Capitalism in Latin America: Sectoral and National Channels in the Making of a New Order*, 2005, *The Annals of the American Academy of Political and Social Science*, 598 (March), pp. 102-124.

<sup>56</sup> Badran, A., *Steering the Regulatory State: The Rationale Behind the Creation and Diffusion of Independent Regulatory Agencies in Liberalised Utility Sectors in the Developing Countries: Initial Thoughts and Reflections on the Egyptian Case*, A Paper submitted for the 3<sup>rd</sup> Biennial Conference "Regulation in the Age of Crisis", European Consortium for Political Research, Standing Group on regulatory Governance, 17-19 June 2010, Dublin.

<sup>57</sup> Gul, S., and Zenginobuz, U., *Independent Regulatory Agencies in Emerging Economies*, 2005, A paper prepared for presentation at the 2005 Annual Conference of the European Consortium for Political Research, Budapest, Hungary, 8-10 September 2005, Online at [http:// http://regulation.upf.edu/ecpr-05-papers/gsosay.pdf](http://regulation.upf.edu/ecpr-05-papers/gsosay.pdf).

<sup>58</sup> Aryeetey, E. and Ahene, A.S., *Utilities Regulation in Ghana*, Centre on Regulation and Competition Working Paper Series, Paper No. 111, June 2005; Kapika, J., and Eberhard, A., *Power Sector Reform and regulation in Africa: Lessons from Kenya, Tanzania, Namibia and Ghana*, 2013, Human Sciences Research Council Press, Cape Town, SA; Aryeetey, E., *The Institutional and Policy Framework for Regulation and Competition in Ghana*, Centre on Regulation and Competition, Working Paper Series, Paper No. 46, December 2002.

Ghanaian trajectory. Thus the field of the regulatory state in the developing world, especially Africa, has been left largely uncharted. There has been none on Nigeria. This is an attempt at filling that void.

A study of the assimilation of the IRA model into Nigeria indicates a distinct pattern dictated largely by domestic drivers with some few international factors being thrown into the mix. This research begins by exploring those domestic drivers responsible for the introduction of the IRA model, and will thereafter consider the international dimensions of this process.

## **2.5.1 Domestic Reasons for the Spread of IRAs in Nigeria**

### *2.5.1.1 State of the Economy*

First, the deteriorating economic situation in Nigeria<sup>59</sup> left government with no viable option but to institute radical reforms which included separating the conflicting roles of government as owner, manager and regulator of services and public utilities.

This inclination towards reforms during hard economic times is consistent with empirical studies,<sup>60</sup> which have determined that a downward

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<sup>59</sup> National Centre for Economic Management & Administration, *Structural Adjustment Programme in Nigeria: Causes, Processes and Outcomes*; A Revised Technical Proposal Submitted to Global Development Network (GDN) at [http://resourcedat.com/wp-content/uploads/2013/04/Nigeria\\_proposal.pdf](http://resourcedat.com/wp-content/uploads/2013/04/Nigeria_proposal.pdf) on 29/06/15.

<sup>60</sup> Empirical support for this argument can also be found in sociological studies of how broad macroeconomic crises led to the adoption of market-oriented reform in Latin America: Armijo, L.E., and Faucher, P., 2001. *We Have a Consensus: Explaining Political Support for Market Reforms in Latin America* in Henisz, et al, *The Worldwide Diffusion of Market Oriented Infrastructure Reform, 1977-1999*, American Sociological Review, 2005. Vol. 70, December: 871-897; Lora, Eduardo. *What Makes Reforms Likely? Timing and Sequencing of Structural Reforms in Latin America*, 2000, Inter-American Development Bank Research Department Working Paper 424; Remmer, Karen, L. 1998. *The Politics of Neoliberal Reform in South America, 1980-94*. Studies in Comparative International Development 33:3-29; Banerjee, S.G., and Munger, M.C., *Move to Markets? An Empirical Analysis of Privatization in Developing Countries*, Fondazione Eni Enrico Mattei Note Di Lavoro, 2002).



trend in the economic conditions of a nation normally triggers major economic policy reforms.<sup>61</sup>

The resort to market-driven reforms was made with the hope that it would avert the impending economic collapse. This response is consistent with the Latin American reaction to poor performance of the economy by instituting reforms in the telecommunications sector.<sup>62</sup>

Empirical studies point to a body of evidence<sup>63</sup> that shows that the adoption of market-driven reforms in ailing nation's economies usually turns in a positive impact on sectoral performance thus pointing the way that government should take.

#### 2.5.1.2 *Loss of Trust and Faith*

Second, the loss of trust and faith by both the military regimes and the civilian leadership in state institutions contributed in no small measure to the emergence of IRAs. Policy makers spanning both eras came to appreciate the futility of putting faith in the nation's political and economic institutions for a way out of the economic quagmire given their structural weakness and apparent failure to arrest the economic drift from the outset.<sup>64</sup> Hampered by the quick turnover of heads of government that in turn caused the replacement at will of chief executives of SOEs and the heads of critical institutions as well as the corrosive nature of corruption that undermined the foundations of critical institutions, undergirded by a largely inept and bureaucratic

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<sup>61</sup> Henisz, Witold J. and Bennet A. Zelner., *Legitimacy, Interest Group Pressures and Change in Emergent Institutions: The Case of Foreign Investors and Host Country Governments*. 2004, Academy of Management Review 29.

<sup>62</sup> Petrazzini, Ben A., *The Political Economy of Telecommunications Reform in Developing Countries: Privatisation and Liberalisation in Comparative Perspective*. 1995, Westport, CT: Praeger.

<sup>63</sup> D'Souza, Juliet and William L. Megginson, *The Financial and Operating Performance of Privatized Firms During the 1990s*, 1999, *Journal of Finance* 54:1397-1438; Megginson, William L and Jeffrey M. Netter. *From State to Market: A survey of empirical studies on privatization*. 2001, *Journal of Economic Literature* 39:321-389; Levy, Brian and Pablo T. Spiller. 1994. *The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation*, 1994, *Journal of Law, Economics and Organization* 10:201-246.

<sup>64</sup> Lewis, P.M., *Growing Apart, Oil, Politics, and Economic Change in Indonesia and Nigeria*, The University of Michigan Press, 2007.

Public Service, there was no reason for any measure of trust nor confidence in institutions of government.

IRAs emerged as the only plausible tool that could halt the trend of institutional weaknesses in government institutions. Empanelling an agency that, though set up by government, would yet be free and independent to make its own decisions based on verifiable data with a long term view to economic development, offered a very tempting proposition, one too attractive to resist.<sup>65</sup> Selling off the ailing SOEs that had become a major drain on the nation's finances to the private sector and committing their supervision into the hands of an independent arbiter (IRAs) seemed the only option left for government.

#### 2.5.1.3 *Credible and Stable Commitments*

Third, the introduction of the IRAs was an avenue used to provide credible and stable commitments to would-be investors, of the government's willingness to stick by its words and promises. It has been acknowledged that much of the blame for Nigeria's faltering economic development is constant changes in policy that affected existing commitments upon which investments were made. A plethora of literature<sup>66</sup> points to the fact that a key obstacle to infrastructure development was the lack of a system that delivers credible commitments that government will not "intervene arbitrarily or capriciously in the operating practices of private infrastructure service providers."<sup>67</sup>

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<sup>65</sup> Sonmez, U., *Independent Regulatory Agencies: The World Experience and the Turkish Case*, A Thesis submitted to the Graduate School of Social Sciences of Middle East University, September 2004.

<sup>66</sup> Heller, W. B. and McCubbins, M.D., *Politics, Institutions and Outcomes: Electricity regulation in Argentina and Chile*, 1996, *Journal of Policy Reform* 1:357-388; Henisz, Witold J. and Bennet A. Zelner, *Political Institutions and Policy Volatility. Economics and Politics*, 2004, 16:1-27; Holburn, G. L.F. and Spiller, P., *Institutional or Structural: Lessons from International Electricity Sector Reforms*. 2003 in *The Economics of Contracts: Theories and Applications*, edited by E. Brousseau and J.-M. Glachant. London: Cambridge University Press; Brian, L. and Spiller, P.L., 1994. *The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation*. *Journal of Law, Economics and Organization* 10:201-246; Brian, L. and Spiller, P.L., 1996, *Regulations, Institutions and Commitment*, 1996, Edited by J. E. Alt and D. C. North, Cambridge: Cambridge University Press.

<sup>67</sup> Henisz, J.H., et al, *International Coercion, Emulation and Policy Diffusion: Market -Oriented Infrastructure Reforms, 1977-1999*, William Davidson Institute Working Paper Number 713, July 2004 at

The necessity for credible commitments emanating from government becomes highlighted when it is noted that investments in utility sectors are long tenured and carry within them the seeds of “irreversible investments” that would be lost if commitments are tampered with.<sup>68</sup> Credible commitments given under a legal and regulatory framework undergirded by IRAs appeared to be the way out, and government decided to take that route.

#### 2.5.1.4 *Political Certainty*

Four, closely following the search for credible commitments was the vexing matter of political certainty. The reasoning behind the delegation of powers to the IRAs was to “tie the hands” of future governments from changing policies that might be painful in the short term but beneficial in the long term. This point is highlighted by frequent changes at the top echelon of the leadership in Nigeria since independence.<sup>69</sup>

Military regimes followed each other relatively quickly, each seeking to correct past wrongs, and there was no guarantee that repudiation of past commitments would not be one of the wrongs to be righted. Hence there was an inclination to insulate investment in infrastructures from policy somersaults through the IRA mechanism. Even within Nigeria’s democratic setting, the political system prescribes a four-year election cycle for political offices which is a short period in within which to guarantee long term investment in infrastructures. The IRA was thus seen as a tool to protect these investments by ensuring the continuity derived from regulatory commitments.

One very apposite example of the havoc which sudden policy changes can cause to a nation’s development is seen in Nigeria’s power sector reforms. Obasanjo’s government in its first term in 1999 developed a National Electric Power Policy, and

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8; Majone, G., *Non-majoritarian Institutions and the Limits of democratic Governance: A Political Transaction-Cost Approach*, 2001 in Badran, note 56.

<sup>68</sup> Badran, note 56.

<sup>69</sup> Sanusi, L. Nigeria’s Economic Development Aspirations and the Leadership Question: IS there a Nexus? , 2012 Yakubu Gowon Foundation (YGF) Distinguished Annual Lecture Series, [http://www.cenbank.org/OUT/2012/CCD/NIGERIA'S ECONOMIC DEVELOPMENT ASPIRATIONS AND THE LEADERSHIP QUESTION IS THERE A NEXUS.PDF](http://www.cenbank.org/OUT/2012/CCD/NIGERIA'S%20ECONOMIC%20DEVELOPMENT%20ASPIRATIONS%20AND%20THE%20LEADERSHIP%20QUESTION%20IS%20THERE%20A%20NEXUS.PDF).

went on to enact legislation in 2005, known as the Electric Power Sector Reform Act (EPSR Act) to reform the entire electric power sector. However, with the coming in of the the Yar'adua government, a policy change occurred and the reforms were shelved. The Commissioners of the regulator, Nigerian Electricity Regulatory Commission, were unlawfully removed and a Sole Administrator, an office unknown to the EPSR Act, was appointed. The reforms did not commence again until after another government, the Jonathan administration, came into power in 2011 and gave new impetus to the reforms. The National Electric Power Authority (NEPA) the state incumbent utility has now been unbundled and sold to private investors along power generation and distribution lines. It is only left to the imagination what investors that had been waiting over the years would have been thinking as successive governments flip-flopped.

#### 2.5.1.5 *Shifting of Blame*

Fifthly, the attraction of shifting blame led the populist military government of Babangida and other successive governments to shift the responsibility for making the tough decisions that related to the cost of services and critical utilities to IRAs. This offered a window for the incumbent government to point accusing fingers at the IRAs if there were public backlashes and loss of political support. The plausible blame argument of government would be that IRAs are independent of government with independent funding streams and hiring processes, so government is not to blame.<sup>70</sup>

#### 2.5.1.6 *Privatisation*

Sixthly, the government used the allure of the revenue inflow that would be realized with privatisation as a reason to fast-track the implementation of reforms and the setting up of IRAs. By the 1980s when Nigeria was beginning to implement economic reforms that included privatisation and the IRA model of regulatory governance, the poor financial state of the nation was glaring. The income revenue that accrued to government had shrunk significantly from N12.3 billion to N7.3 billion as a result of the

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<sup>70</sup> Thatcher, note 3.

international oil crisis.<sup>71</sup> During the same period, foreign reserves dipped from N5.462 billion to just N798.5 million while the external debt portfolio doubled from \$9 billion in 1980 to \$18 billion in 1983! Government estimated that this quick cash injection into the economy would alleviate the fiscal challenges being encountered.

Furthermore, the method of sale of public assets under privatisation, especially recently, follows a process whereby government conducts a valuation of the asset, keeps the valuation price secret and invites bidders to make bids. A bid is not accepted unless it is above the valuation price. This invariably encourages government to sell and reap a windfall, and with the sale, the IRA comes on stream to regulate the market into which the new owners have entered. There is, in addition a large body of literature<sup>72</sup> that clearly points to better performance of firms when sold to private capital than when in government hands, thus boosting the argument for privatisation in Nigeria.

#### 2.5.1.7 *The Need for a New Regulatory Framework*

Seventhly, when privatisation occurs, SOEs are sold off to private investors and the emerging interests of all the players in the value chain become non-convergent. On the one hand, the new owners' overriding aim is to seek a quick recovery of their investments and high profits, while the consumer or end user desires the best possible services at the lowest possible cost. The Government, the former owners, on the other hand are basically interested (especially in democratic settings) in maintaining harmony within the body polity and ensuring that nothing should be done by any of the parties to disturb or overturn the apple cart and affect their electoral fortunes.<sup>73</sup> The IRA is thus called into play to balance these legitimate but conflicting expectations.

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<sup>71</sup> Falola and Heaton, note 46 at 203-204.

<sup>72</sup> Shirley, M. and P. Walsh, *Public versus private ownership. The current state of the debate.*, 2000, Policy Research Working Paper No. 2420, The World Bank, Washington, D.C., August; Afeikhena, J., *Privatization and Enterprise Performance in Nigeria: Case Study of Some Privatized Enterprises*, AERC Research Paper 175 African Economic Research Consortium, Nairobi February 2008.

<sup>73</sup> Andzenge, T. *Privatisation and Regulation: Inevitable Twins?* A Paper Submitted to the Institute of Advanced Legal Studies, 2012 at 14.

Also, experience worldwide shows that when SOEs are sold off, there is a high tendency for them to transmute from being public monopolies into private monopolies, except where they are hemmed in and controlled (regulated) by a third force (IRA) that would promote competition and fairness in pricing for goods and services.<sup>74</sup>

#### 2.5.1.8 *Expeditious Resolution of Utility Issues*

Eighthly, services provided by utilities are critical to the survival and well-being of the citizenry and the quick resolution of issues relating to the availability, cost and quality of services such as electricity, telephony, water, transportation and petroleum requires prompt and round the clock attention. Idigbe argues that current international best practice justifies the decision of the legislature to delegate the monitoring of particular sectors to IRAs. IRAs operate on a full time to monitor, make rules and enforce the law in a particular sector. This is within the context of the fact that neither the legislature nor the courts sit every day and they do not possess the capacity to closely monitor the deregulated market comprising multiple participants.<sup>75</sup>

The foregoing are some of the domestic drivers responsible for the emergence of the IRA model in Nigeria. However, it is to be noted that these drivers in themselves alone would have been unable to facilitate the spread of IRAs into Nigeria. There were other undercurrents of international dimensions that provided the impetus needed for the domestic drivers to be triggered.

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<sup>74</sup> Ibid; Buchs. T., *Privatisation in Sub-Saharan Africa: Some Lessons from Experiences to Date*, 2003, International Finance Corporation at 2.

<sup>75</sup> Idigbe, A., *Quasi-Judicial Functions Of Regulatory Institutions – A Perspective From The Bench*, A Paper Presented on 17<sup>th</sup> July 2012 at the 2<sup>nd</sup> Seminar for Judges on Electric Power Sector 2012 held at the Amba Tinapa Hotel, Calabar, Cross River State, [www.punuka.com](http://www.punuka.com).

## 2.5.2 International Drivers in the Diffusion of IRAs in Nigeria

### 2.5.2. 1 *Learning- Drawing*

The first impetus for the introduction of the IRA model of regulatory governance into Nigeria was through lesson-drawing and emulation. Lesson-drawing when considered alongside policy diffusion, is a situation where “knowledge about policies, administrative arrangements or institutions is used across time or space in the development of policies, administrative arrangements and institutions elsewhere.”<sup>76</sup> The transporters, carriers, exporters or inducers of this transfer of policy through learning, extend to governments represented by legislators, bureaucrats and extra-governmental agencies, individuals, organizations,<sup>77</sup> transnational corporations,<sup>78</sup> and non-governmental organizations (NGOs), which are referred to in diffusion literature as the Third Sector.

Drawing from the above, learning and emulation have been implicated in several ways as a vehicle for the spread of market oriented policies and the IRA model in Nigeria.

Firstly, the World Bank led the pack of intermediating agencies, and other nation states in realising the efficacy of employing education as a vehicle to facilitate the spread of ideas. A World Bank report<sup>79</sup> expressly acknowledged that “knowledge, not capital, is the key to sustained economic growth and improvements in human well-being”. Even though the intermediating agencies have different objectives and areas of specialization and expertise, in the Nigerian context they leveraged on each other’s strengths to deploy and utilise the mechanism of learning to spread economic ideas

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<sup>76</sup> Stone, D., *Learning Lessons, Policy Transfer and the International Diffusion of Policy Ideas*. CSGR Working Paper No. 69/01, April 2001 at 3.

<sup>77</sup> Ibid at 16.

<sup>78</sup> Walter, Andrew. (1999) *Globalisation and Policy convergence: The Case of Direct Investment Rules*, in R. Higgott, G. Underhill & A. Bieler (eds) *Non State Actors and Authority in the Global System*, London, Routledge.

<sup>79</sup> World Development Report 1998-99 derived from World Bank Reports domiciled at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTWDRS/0,,contentMDK:22293493~pagePK:478093~piPK:477627~theSitePK:477624,00.html>.

within Nigeria.<sup>80</sup> The generic word that was utilised to spread knowledge on and about the IRA model was “capacity building” through training, workshops and study tours by the intermediating agencies and other Western nations.

These included the Global Development Network (GDN) initiative, Distance Learning programme, the Learning and Leadership Centre and the Training Institutes managed by the World Bank Institute (WBI) that created partnerships with the government, NGOs, training institutes and think tanks. Similar bodies were the Global Environment Facility, an initiative of the United Nations, a partnership for international cooperation where 183 countries work together with international institutions, civil society organizations and the private sector, to address global environmental issues; the Environmental and Natural Resources Group of The World Bank Institute (WBIEN) and the Environmental Economics and Policy Research Network that served as a common repository of ideas, experiences and knowledge to which independent regional networks contributed.

Secondly, intermediating agencies devised an ingenious route through which policies and ideas were remotely diffused from them to Nigeria. The strategy usually began with an offer of grant in aid to a selected sector, with the proviso that all key technical personnel and consultants required to carry out the scope of the grant would come from the donor.<sup>81</sup> It ended up that the grant funds never left the shores of the donor country as the entire consultancy fees were paid to law firms, banks and consultants hired by the donor agency within its shores.<sup>82</sup> The basic brief of these consultants was to advise on the IRA model as the most suitable for facilitating private sector provision on infrastructure. The rationale for utilising the external consultants was premised on the argument that there was a lack of local capacity to provide such

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<sup>80</sup> Nsouli, S.M., *Capacity Building in Africa: The Role of International Financial Institutions*, Finance & Development, A quarterly magazine of the IMF, December 2000, Vol. 37, No. 4.

<sup>81</sup> Stone, note 76 at 26.

<sup>82</sup> Ibid at 24.



services that cover a range of advises on legal, regulatory, and institutional reforms in infrastructures and services.

Thirdly, foundations and non-profit organizations were involved in the transfer of these policy ideas and concepts. These ranged from large well known foundations such as the Ford Foundation, MacArthur Foundation, and the Bill & Melinda Gates Foundation, to other global developmentally inclined foundations operating in Nigeria such as the Friedrich Ebert Foundation, the Soros Foundation operating under the acronym Open Society for West Africa (OSIWA), the Shell Foundation, and the Konrad Adenauer Foundation Nigeria, among others. These Foundations were set up to espouse principles and values of democracy and free market. This was actualised by getting actively involved in capacity building and in the dissemination of these ideas and concepts. They supported civic educational activities in the fields of human, social and political rights, gender democracy, conflict resolution, and good governance.

One feature that connects all these foundations has been their clear identification with, and support for, the imbibing and development of knowledge-based capacities that promotes a market-based economy and the IRA model. From behind the scenes, these foundations and non-profit organizations supported activities, such as research and analysis, technical assistance, education, training, conferences, study tours, pilot and demonstration projects, in aid of Nigerian's reform initiatives.

Fourthly, the part played by universities, scholars and online colleges in disseminating market -oriented policies and programmes cannot be neglected in the context of Nigeria.<sup>83</sup> Prior to their transplanting to Nigeria, market-driven reforms were an alien concept in Nigeria and there was no body of literature, knowledge base or information on its essentials. As a result, international schools and universities filled the gap in providing leadership in educating, teaching, instructing, tutoring and mentoring

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<sup>83</sup> Sinclair, T. J., *Reinventing Authority; Embedded Knowledge Networks and the New Global Finance*, 2000, Government and Policy in Stone, D., *Learning Lessons, Policy Transfer and the International Diffusion of Policy Ideas*. CSGR Working Paper No. 69/01, April 2001 at 28.

students, technocrats, policy makers and legislators in Nigeria on the fundamentals of market-driven concepts.

Eberhard notes that there has been an increase in regulatory training courses since market –driven reforms took off in the 1990s, most of them funded by donor agencies. The trend has been for the curriculum to be tailored along western “best practices” models and concepts espousing free market ideas lines with the instructors drawn from the west.<sup>84</sup> One prominent example is the training programme of the Public Utility Research Centre at the University of Florida, USA. This has been a meeting point in the past for more than two decades for training politicians, legislators, policy makers and technocrats in the fundamentals of regulating utilities and the entrenchment of market-driven concepts in regulation. A sizeable number of participants at these annual training programmes have been drawn from Nigeria.

#### 2.5.2.2 *Emulation*

Emulation as a concept has been defined as tendency that “actors that are strongly connected to one another tend to imitate each other’s behaviour patterns.”<sup>85</sup> Theorists<sup>86</sup> have argued that states or entities in a particular setting may gravitate towards similar behavioural patterns in order to be seen to “belong.” As a vehicle of policy diffusion, emulation has also featured in the dynamics that created fertile soil for market-driven policies such as IRAs to thrive in Nigeria.

#### 2.5.2.3 *Colonial Mentality*

Another reason that accounts for the adoption of market-driven policies including the IRA model without scrutiny was the concept of colonial mentality that has pervaded

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<sup>84</sup> Eberhard, A., *Infrastructure Regulation in Developing Countries: An Exploration of Hybrid and Transitional Models*, Public-Private Infrastructure, Advisory Facility (PPIAF) Working Paper No. 4, 2007.

<sup>85</sup> Hennisz, et al, *The Worldwide Diffusion of Market Oriented Infrastructure Reform, 1977-1999*, American Sociological Review, 2005. Vol. 70.

<sup>86</sup> DiMaggio, P.J. and Powell, W.W., *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*. 1983, American Sociological Review 48:147–60; Mizruchi, Mark S. and Joseph Galaskiewicz. *Networks of Interorganizational Relations*., 1993, Sociological Methods and Research 22:46–70.

the Nigerian psyche since independence in 1960 and continues to stalk the nation.

Colonial mentality refers to

institutionalised or systemic feelings of inferiority within some societies or peoples who have been subjected to colonialism, relative to the mores or values of the foreign powers which had previously subjugated them. The concept essentially refers to the acceptance, by the colonised, of the culture or doctrines of the coloniser as intrinsically more worthy or superior.<sup>87</sup>

This mentality expresses the thinking that anything foreign, be it items, talents, products or ideas is always better when compared to local ones. This has been one of the hangovers of colonialism which instinctively impressed among the colonised the feeling that what they had was inferior, be it culture, language, clothing, religion, etc.<sup>88</sup>

The spread of market –driven policies was implicated here because colonial mentality led to the reception of the IRA model without an informed interrogation of its appropriateness. It was considered as a product of the West, the erstwhile colonial masters and was for that reason better than local concepts.

#### 2.5.2.4 *Coercion Isomorphism*

Another route through which IRAs spread in Nigeria was coercion isomorphism. This occurs “when powerful actors influence the policy choices of governments directly or when such actors change the outcome of a domestic policy struggle by favouring the domestic coalition supporting a given policy.”<sup>89</sup> Embedded in this mechanism is direct and indirect or soft coercion. Most of the literature on the subject agrees on the overwhelming role of intermediating agencies, which control huge financial resources that countries with ailing economies need desperately. As explained by Henisz et al<sup>90</sup>, these agencies deploy their financial authority to influence or to coerce countries in

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<sup>87</sup> BrownPride.com <http://boards.brownpide.com/showthread.php/colonial-mentality-103284.html?s=c664e0d851befaf56e25ed90c8d06075&amp;>.

<sup>88</sup> Nnam, N.M., *Colonial Mentality in Africa*, Hamilton Books USA, 2007.

<sup>89</sup> Henisz, note 85 at 874.

<sup>90</sup> Ibid.

need of financial aid to adopt economic reforms that the latter would in normal circumstances not be willing to accept. The market reforms that included the IRA model were promoted and enforced in the form of “conditionality terms” that were embodied in the loan terms, and aimed, in the words of two IMF economists<sup>91</sup>, to provide the lender with safeguards that the receiving country would take the stipulated measures in order to remedy its macroeconomic and structural imbalances, and be in a position to pay back the loan.

There is also the indirect coercion that is relevant in the pattern of the spreading of IRAs in Nigeria. This was deployed through the instrumentality of technical assistance. The argument about indirect coercion is exemplified by an incident recorded in the book *The Accidental Public Servant* by El-Rufai, a former Minister in the government of Nigeria. As part of a Nigerian delegation, El-Rufai met with a visiting delegation of the IMF late into the night to negotiate terms of an IMF Monitored Programme. On the resumption of the meeting the next morning, the officials of the Ministry of Finance on the Nigerian delegation had on the table a prepared draft Letter of Intent purportedly from Nigeria to the IMF. El-Rufai, being a newcomer in government, was surprised and impressed at the quick response level of the ministry officials who would normally take weeks to prepare such a document. The author however indicates his dismay when he discovered later that the draft was actually prepared and brought along to the meeting by the IMF delegation and quietly given to the Federal Ministry of Finance officials. What the Nigerian delegation was required to do was to produce the IMF prepared Letter of Intent on government letter-headed paper and hand it over to the IMF delegation as though it was the Nigerian delegation’s own. The author goes on to suggest that part of the reasons why most of the reform programmes agreed to by African countries failed was because the leaders signed the

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<sup>91</sup> Khan, M.S. and Sharma, S., *IMF Conditionality and Country Ownership of Programs*. 2001, International Monetary Fund Working Paper 01.

“pre-fabricated” agreements, took the money and then refused to implement the reforms.<sup>92</sup>

Another form of indirect coercion that was evident in the Nigerian context was where outside institutions intervened in covert but targeted ways to influence and tilt the balance of argument in favour of reforms and the setting up of IRAs. This was done through empowering “targeted groups with resources, legitimacy, or rhetorical arguments or prompting other groups to join in the pro-reform coalition.”<sup>93</sup> The main vehicles implicated in this method of diffusion were non-governmental organizations (NGOs) that proliferated in unprecedented fashion in the developing world and in Nigeria between 1980 and 2000.<sup>94</sup>

Given the potent force of NGOs in fostering awareness and galvanising public opinion,<sup>95</sup> *governments, intermediating agencies and other international agencies moved to leverage on this by seeking to influence public discourse and discussions on the reforms.* Western governments’ active and direct support through donors who were working with local NGOs had been an open secret in Nigeria. Africa alone accounts for over 8,000 NGOs <sup>96</sup>, most of which work on developmental issues including economic reform; while Nigeria takes the lion’s share of that number with thousands of such bodies employing millions of workers and volunteers.<sup>97</sup>

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<sup>92</sup> El-Rufai, A.N., *The Accidental Public Servant*, Sahara Books Limited, Ibadan, 2013 at 60

<sup>93</sup> Badran, note 56.

<sup>94</sup> Ngugi, J.O and Okafor, O.C., *Legitimizing Human Rights NGOs: Lessons from Nigeria*, Fordham International Law Journal, Volume 31, Issue 2 2007 Article 3.

<sup>95</sup> Bagci, C., *Historical Evolution of NGOs: NGO Proliferation in the Post-Cold War Era*, 2003, originally published in *Avrupa Gunlugu* in No: 4/2003 pp. 299-326 but domiciled in <http://www.turkishweekly.net/article/222/historical-evolution-of-ngos-ngo-proliferation-in-the-post-cold-war-era.html>.

<sup>96</sup> Igoe J, Kelsall T, editors. *Between a Rock and a Hard Place: African NGOs, Donors and the State*. Durham: Carolina Academic Press; 2005.

<sup>97</sup> Dibie J, Dibie R. *Motivation and volunteerism in NGOs in Ghana and Nigeria*. In: Dibie R, editor. *Non-Governmental Organizations (NGOs) and Sustainable Development in Sub-Saharan Africa*. Lanham: Lexington Books, 2007 at 121-137; Peters, B.G., *Policy Transfers Between Governments: The Case of Administrative Reforms*, 1997, *West European Politics*, 20(4): 71-88; Larmour, P, *Coercive Transfer? Conditionality and Policy Reform in PNG and the South Pacific*, 2000, An unpublished paper, Australian National University in Stone,

### 2.5.2.5 Globalisation

Globalisation accounts for the fifth external mechanism through which market reforms and the IRA model were introduced into Nigeria. The world rapidly became a global village through globalisation that took root in the 19th century<sup>98</sup> and prevailing literature in the field implicates this avenue as one that positively influenced the spread of market reform ideas.<sup>99</sup>

The way globalisation impacted on the spread of IRAs can be seen in the manner in which the model spread so uniformly across varied geographical divides within such a short time. Almost globally, where market-oriented reforms took root, including Nigeria, there has been a triangular sequencing of the reforms: market-oriented liberalization, the regulation of all players on economic, environmental and social planes, and the privatisation of publicly owned and managed utilities, with some slight deviations. To this extent therefore, it can be conclusively stated that globalisation played an identifiable role in the emergence of IRAs in Nigeria as a vehicle that transported concepts and models across national boundaries.

## 2.5 Conclusion

This chapter has traced the rise of the regulatory state, its theoretical underpinnings and the tensions it generated, and the mutuality of the resolution of those contentions in the USA. It has identified the conditions that led to the spread of IRAs to Western and then later Eastern and Central Europe and finally into Nigeria.

The rapidity and pervasiveness of its spread in Nigeria call for an inquiry into the *fait accompli* status IRAs have come to assume in Nigeria and whether this “taken for granted” status can be justified given Nigeria’s institutional deficits.

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D., *Learning Lessons, Policy Transfer and the International Diffusion of Policy Ideas*, CSGR Working Paper No. 69/01, April 2001 at 5.

<sup>98</sup> O’Rourke, K and Williamson, J.G., *When Did Globalization Begin?* NBER Working Paper No. 7632 Issued in April 2000; Riello, G., *Globalisation, Making of the Modern World* Lecture Wednesday 7 January 2015, g.riello@warwick.ac.uk .

<sup>99</sup> Gilardi, F., et al., *Regulation in the Age of Globalisation: The Diffusion of Regulatory Agencies across Europe and Latin America*, IBEI Working Papers, Barcelona, May 2006; Bulmer, S. and Humphreys, P., *Of Phones and Planes: Policy Transfer in the Liberalization of EU Public Services*, Paper for EUSA conference 2007, Montreal.

Chapter 3 will therefore consider the state and quality of institutions within Nigeria's political economy that are required to support the IRA to succeed.

## CHAPTER 3

### POLITICAL AND SUPPORTING INSTITUTIONS

#### 3.1 Introduction

This chapter primarily seeks to examine the concept, importance, and relevance of political and related institutions to economic development and the IRA model. Secondly, it identifies and delineates the contours of the different institutions that are relevant to the present research endeavour. Thirdly, it discusses the identified institutions and the overarching role of political leadership in the Nigerian context, highlighting its overshadowing antecedents in and over institutions and the outcomes. The last part of the chapter undertakes an evaluation of the adequacy or otherwise of the identified institutions in undergirding the IRA model.

The rapid spread of Independent Regulatory Agencies (IRAs) in developing countries and Nigeria particularly calls for an evaluation of its institutional fabric to ascertain whether the fabric can support the model and provide it the fertile soil in which to grow and endure. This evaluation is necessary for three major reasons.

One is the critical nature of infrastructure to Nigeria's socio-economic development and its dearth across the many sectors of the nation's life. The second is the manner in which these IRAs sprouted without a careful interrogation of its outcomes. Third, is the "hegemonic"<sup>1</sup> pressure that was directed towards governments to implement economic policies and set up institutions such as IRAs during the economic reforms era of the 1980s and 1990s. Such reforms did not permit a consideration of possible alternatives that could fit their contextual peculiarities. In a large part, foreign governments in developed nations, through multi-national corporations and intermediating agencies with budgets far in excess of the GDP of

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<sup>1</sup> Davis, D., and Corder, H., *Globalisation, National Democratic Institutions and the Impact of Global Regulatory Governance on Developing Countries*, 2009, Acta Juridica 68 2009 at 81.



many nations exerted these pressures<sup>2</sup>, and the recipient nations were left with no alternatives.

Historically in developing countries, most of the basic infrastructures, such as water supply, transportation, the postal service, electricity, health, education, and financial services were for most of the 19<sup>th</sup> and 20<sup>th</sup> centuries owned, operated, and provided for, by the public sector.<sup>3</sup> The reasons for this were many. They included the long-term nature of the investments that only the state could provide then, due to the embryonic nature of the indigenous private sector and the urge by the state to control the major aspects of the economy to propel economic development. In addition, the state utilised the State Owned Enterprises (SOEs) as employers of last resort to satisfy its political yearnings.

However, by the 1980s the role of the state began to wane. This was because of the global economic meltdown and the accompanying economic reforms as it became evident that the state alone lacked the financial resources to provide the robust infrastructural backbone needed to propel economic growth. The reforms, encapsulated under policy frameworks of deregulation, privatisation, regulation, and liberalisation, were geared towards increased private sector participation in the ownership and provision of infrastructure and services.<sup>4</sup> Thus by 2004, 60% of developing countries had significant private sector ownership and participation in telecoms industry with almost 40% having substantial private participation in the provision of electricity and water. In addition, two-thirds of developing countries had introduced some form of IRA model in the telecoms sector, 54% in electricity, and 23% in water.<sup>5</sup> The role of IRAs was regulatory and interventionist in nature to balance the different interests of all the players in the value chain.

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<sup>2</sup>Ibid

<sup>3</sup>Farzin, H., in *Regulation and Development* by Jean-Jacques Laffont, Cambridge University Press, 2005 at xv.

<sup>4</sup>Laffont, J.J., *Regulation and Development*, Cambridge University Press, 2005 at xix.

<sup>5</sup>Estache, Antonio and Ana Goicoechea., *A Research Database on Infrastructure Economic Performance*, 2005, World Bank Policy Research Working Paper: No. 3643.

Given the role infrastructures play in the socio-economic development of a nation,<sup>6</sup> there has been an appreciation of the need to have viable institutions that underpin its provision. These institutions provide the supporting structures, incentives and trade-offs that allow for the ownership and deployment of these infrastructures and services. Thus, on the global and national stages, the role of the state did not wane but rather metamorphosed into one of regulation. Through this new role, the state evolves different sets of rules that shape the conduct of enterprises, states, and individuals through institutions.<sup>7</sup>

Global agreement has emerged in the past three decades asserting the premise that institutions matter for economic growth and development.<sup>8</sup> However, this has not always been the case. Prior to and until the 1980s, emphasis was on the implementation of good economic policies as a path to economic development.<sup>9</sup>

The “Washington consensus”<sup>10</sup> concluded that the only viable way out of poor economic performances was for countries to get the policies right. The intervening

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<sup>6</sup>Voice of America Editorial; *Infrastructure Crucial to Development*, 10/10/2012, <http://editorials.voa.gov/content/infrastructure-crucial-to-development/1523572.html>. Website visited on 4/17/2014 at 10.34pm.

<sup>7</sup> Davis and Corder, note 1.

<sup>8</sup>North D, *Institutions, Institutional Change and Economic Performance*, 1990, Cambridge: Cambridge University; North, D., *Institutions*, *Journal of Economic Perspectives*, 1991, Vo. 5, No 1 at 97-112; Adogamhe, P. G., *Economic Policy Reform & Poverty Alleviation: A Critique of Nigeria's Strategic Plan for Poverty Reduction*, 2010, *Poverty & Public Policy*, 2(4), 49-80; De Soto, H., *The mystery of capital: Why capitalism succeeds in the West and fails everywhere else*, 2000, New York: Basic Books; Abdulai, R. T., & Ndekugri, I. E., *Indigenous Landholding Institutions as an Impediment to Economic Use of Land: Case Studies of Tamale and Bolgatanga in Ghana Indigenous Peoples and Real Estate Valuation*, (2008) Vol. 2 (4), (pp. 19-37): Springer; Acemoglu, D., et al, *Institutions as a Fundamental Cause of Long term Growth*, in *Handbook of Economic Growth*, Volume IA. Edited by Philippe Aghion and Steven N. Durlauf, 2005, Elsevier B.V.

<sup>9</sup>Lal, D., *Institutional Development and Economic Growth*, Working Papers Number 782, Department of Economics, University of California, Los Angeles, February 1998; Carlin, W, et. al, *Institutions matter for growth, but which ones and how much?*, [www.voxeu.org](http://www.voxeu.org), February 17, 2010 at 1.

<sup>10</sup> “The Washington Consensus” is a term coined by John Williamson who summarized ten common principles in the reforms that were recommended to developing countries in the 1970s and 1980s by Intermediating Agencies. The reform principles included fiscal discipline (reduction of budget deficits), investment rather than consumption in public expenditure, tax reform, financial liberalization, unified exchange rates (currency devaluation), trade liberalization, removing barriers on foreign direct investment, privatization of state enterprises, deregulation of competitive markets and security of private property rights. See Williamson, J., *The Washington Consensus as Policy Prescription for Development*, 2005, in

global financial crisis of 1997-98 shook economists' confidence in the theory of the primacy of the right policies. By the late 1990s, the theory of the poor quality of institutions being at the root of economic challenges of developing countries became widespread. Intermediating agencies led by the IMF and the World Bank began to stipulate “governance related conditionalities” which made it incumbent for a borrowing country to adopt “better” institutions that improve “governance”.<sup>11</sup> The emerging consensus was that the existence of good policies per se, without the existence and effective functioning of good institutions would undoubtedly attract disastrous economic results.<sup>12</sup>

This thinking, encapsulated under the New Institutional Economics (NIE), an intersection of economics,<sup>13</sup> law, sociology, political science, and anthropology, sought to understand how institutional frameworks in the social, political, and commercial spheres combined with economic agents interacted to shape economic outcomes.<sup>14</sup> As the studies took root globally, a clear thread emerged, one that recognised good institutions as an essential variable that determines the outcome of interactions between economic agents leading to either sustainable development or economic failure.<sup>15</sup> The major proponents of this primacy of institutions theory have been Douglas North, Dani Rodrik and Daron Acemoglu, Simon Johnson and James Robinson.

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*Development Challenges in the 1990s: Leading Policymakers Speak from Experience*, edited by Timothy Besley and Roberto Zaghera. New York: The World Bank and Oxford University Press; Walle, N.V.d., *African Economies and the Politics of Permanent Crisis, 1979-1999*, 2001, Cambridge: Cambridge University Press.

<sup>11</sup>Kapur, D. and R. Webber, R., *Governance-related Conditionalities of the IFIs*, 2000 G-24 Discussion Paper Series, no. 6, Geneva: UNCTAD.

<sup>12</sup> Lora, E., ed., *The State of State Reform in Latin America*, A Co-publication of Stanford Economics and Finance, the World Bank, Inter-American Development Bank, 2007, Stanford University Press; Stein, H., *Beyond the World Bank Agenda,- An Institutional Approach to Development*, 2008, Chicago: University of Chicago Press at 38-42; Kapur, D., and Webber, R., *Governance – Related Conditionalities of the IFIs* in Ha-Joon Chang, *Institutions and Economic Development: theory, policy and history*, The Journal of Institutional Economics, 2010, 7:4, at 473 498.

<sup>13</sup>North, note 8.

<sup>14</sup> Klein, P.G., *New Institutional Economics*, in Bouckaert and De Geest, *Encyclopedia of Law and Economics*, Northampton, MA: Edward Elgar, 2000, Vol. I, at 456-489.

<sup>15</sup>Osabuohien, E., et al, *Planning to Fail or Failing to Plan: Institutional Response to Nigeria's Development Question*, African Development Bank Group Working Paper No. 162, December 2012.

The idea that institutions matter for development has both theoretical and empirical foundations.<sup>16</sup> On the theoretical platform, the genesis of the idea that institutions were critical to development arose from a basic assumption developed by the NEI school of thought that “people are rational actors who respond to incentives, and these incentives are influenced, if not determined, by institutions that induce individuals and organisations to engage in productive activities – or the converse.”<sup>17</sup> The empirical foundation for the support of the institutional theories of development draws its strength from cross-country studies and trends that show a persuasive correlation between the quality of institutions and development.

In the Nigerian context, Focu<sup>18</sup> and Osabuohien et al,<sup>19</sup> in a report on Nigeria’s economic path, both concluded that poor institutional frameworks were to blame for the poor outcomes of the country’s economic indices.

Since sustainable economic development rides on the back of viable and good institutions, it is desirable to ascertain what these are and the impact, if any, they have in providing a platform for the IRA model of regulatory governance to thrive in Nigeria.

### 3.2 What are Institutions?

What then are institutions? Which institutions matter for economic growth and the entrenchment of the IRA model? How exactly are they important in aiding economic development?

North broadly defines institutions as

rules of the game of a society, or, more formally, are the humanly devised constraints that structure human interactions. They are

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<sup>16</sup> Trebilcock M.J., and Prado, M.M., *An Advanced Introduction to Law and Development*, Elgar Advanced Introductions, 2014, Edward Elgar Publishing Limited, INC, USA.

<sup>17</sup> Ibid at 32.

<sup>18</sup> Fosu, A.K., and Gyapong, A., *Terms of Trade and Growth of Resource Economies: A Tale of Two Countries*, Presentation at the IMF Institute High Level Seminar on ‘Natural Resources, Finance, and Development: Confronting Old and New Challenges’, in Algiers, Algeria, 4-5 November 2010.

<sup>19</sup> Osabuohien, note 15 at 6.

composed of formal rules (statute law, common law, regulation), informal constraints (conventions, norms of behaviour, and self-imposed codes of conduct), and the enforcement characteristics of both".<sup>20</sup>

Lin and Nugent see institutions as a "a set of humanly devised behavioural rules that govern and shape the interaction of human beings, in part by helping them to form expectations of what other people do."<sup>21</sup>

On a functional note, however, institutions encompass a variety of legal entities such as parliaments, courts of law and central banks and extend to "any generally accepted procedure that governs the process of interaction between members of a society."<sup>22</sup> Apart from these substantive institutions, other sets of institutions support, safeguard, and give legitimacy to the main institutions. This latter group encompasses non-governmental organisations (NGOs), political parties, electoral bodies, the media, and law enforcement institutions. The specificity of these institutions does not however derogate from or limit the broadness of the concept to cover "any generally accepted procedure that governs the process of interaction between members of a society."<sup>23</sup>

What are good institutions as distinct from mere institutions? Although several writers<sup>24</sup> have researched the concept, there is a shortage of clear definitions.

In seeking to delineate the exact contours of good institutions, Chang<sup>25</sup> notes that they are referred to as Global Standard Institutions (GSIs) and are typically found in

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<sup>20</sup> North, D., *The New Institutional Economics and Third World Development* in J. Harris, et al, (eds), *Economics and Third World Development* (London: Routledge, 1995) at 17

<sup>21</sup> Lin, J.Y. and Nugent B.J., *Institutions and Economic Development*, 1995, in *Handbook of Development Economics*, Jere Behrman and T.N. Srinivasan (eds), Vol. 3A, New York: Elsevier Science, North Holland, 2301-2370.

<sup>22</sup> Brunt, L., *Which Institutions matter for Economic Growth*, in *Property Rights and Economic Growth: Evidence from a Natural Experiment*, CEPR DP 6404. September 2007.; Soysa, I.D, and Jutting, J., *Informal Institutions and Development – Think Local, Act Global*, OECG Development Centre and Development International Seminar on Informal Institutions and Development – What do we know and what can we do?, 2006.

<sup>23</sup> Ibid.

<sup>24</sup> Dandume, M.Y., *Institution and Economic Growth Performance in Nigeria*, Online at <http://mpra.ub.uni-muenchen.de/52356/> MPRA Paper No. 52356, posted 29. December 2013 04:56 UTC; Mijiyawa, A.G., *Economic Growth Sustainability: Do Institutions matter, and Which One prevails?*, Fall 2008, *Cato Journal*, Vol. 28, No. 3.

Anglo- American countries. They are essentially seen as “maximizing market freedom and protecting private property rights most strongly.” He goes on to enumerate seven categories of institutions commonly dubbed good institutions. They include a common law legal system, an industrial system based on private ownership, and a financial system based on a developed stock market with easy mergers and acquisitions. Others include, an efficient financial regulation regime that embeds a politically independent central bank, a shareholder-oriented corporate governance system, and a flexible labour market that allows quick re-allocation of labour in response to price changes. In addition, institutions include a political system that restricts arbitrary actions of political rulers and their agents.<sup>26</sup>

In underlining the primacy of good institutions to economic development and the efficient functioning of the IRAs, it is necessary to state that developed Western nations did not utilise the aforementioned sets of good institutions as a ladder to economic prosperity. It is therefore ironic for them to be making a case for the adoption of these institutions by developing countries as a prerequisite for development.<sup>27</sup> This thesis does not downplay the importance of institutions to economic growth by the above statement, however, it is posited that developing countries ought to situate these institutional models within the contextual limitations of their economies, allowing them space and time to evolve in order to attain good fits suitable for the particular stage of a specific developing country.

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<sup>25</sup> Chang, H.J., *Institutions and Economic Development: theory, policy and history*, The Journal of Institutional Economics, 2010, 7:4 at 473 – 474.

<sup>26</sup> Ibid.

<sup>27</sup> List, F., *The National System of Political Economy*, translated from the original German edition and published in 1841 by Sampson Lloyd, London, Longmans, Green and Company; Chang, H.J., *Kicking Away the Ladder: Development Strategy in Historical Perspective*, 2002, Anthem Press, London; Chang, note 25.

### 3.3 Classification of Institutions

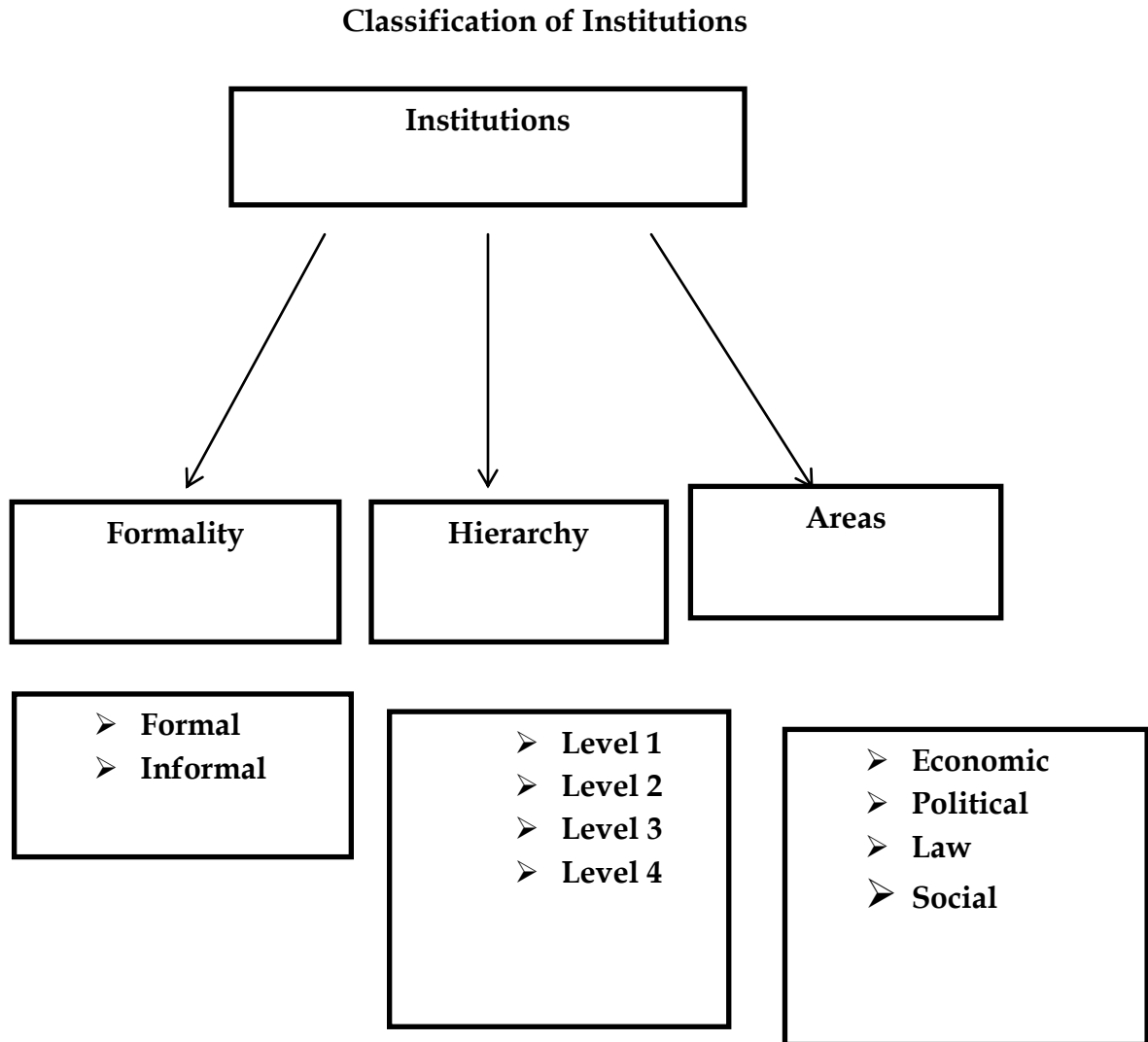
Diagram 1, developed by Jutting<sup>28</sup> along with other streams of literature arising from the NIE School of Thought on institutions,<sup>29</sup> classifies them into three broad categories. This thesis finds this classification robust enough to cover its essence and adopts it. The classification uses three approaches contingent upon the degree of formality, different levels of hierarchy, and the area of analysis.

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<sup>28</sup> Jutting, J., *Institutions And Development: A Critical Review*, OECD Development Centre Working Paper, 2003, No. 210 (Formerly Technical Paper No. 210).

<sup>29</sup> North, et al note 8 at 97-112.

DIAGRAM 1



This thesis however relies primarily on the last classification of the Area of Analysis as it adequately makes a consideration of the issues amenable to a concise interrogation. This classification interfaces and overlaps with the first two classifications, and includes institutions of a political, legal, social, and economic nature.



While economic institutions specify rules that define the production, allocation and distribution process of goods and services including markets<sup>30</sup>, property rights<sup>31</sup> and contracts enforcement<sup>32</sup>; political institutions usually detail the rules governing the political structure of a society. The latter typically spells out the political governance structure, and the constraints thereon through checks and balances.<sup>33</sup> This encompasses electioneering processes, electoral rules, types of political systems, party composition of the opposition and the government. Law and legal institutions are an amalgamation of the type of legal system, and the definition and enforcement of property rights and legal origin.<sup>34</sup> Social institutions on the other hand, extends to rules that have to do with the social needs<sup>35</sup> of the citizenry, to wit, access to health, education, human capital<sup>36</sup>, and social security.

### **3.4 Relevance of Institutions to Economic Growth and Functioning of IRAs**

Seeking to justify the relevance of institutions to economic growth and the functioning of IRAs is akin to validating the desirability of tracks and rails where there are trains. Institutional structures accompanied by the rules of behaviour are the life-blood of markets for the simple reason that policies and reforms are not “self-creating; self-regulating; self-stabilizing, or self-legitimizing.”<sup>37</sup> They need vehicles in the form of

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<sup>30</sup> Jutting, note 28 at 14; Bowles, S., *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, The Journal of Economic Literature, Vol. XXXVI, No. 1, March 1998, at 75-111.

<sup>31</sup> Acemoglu D., and Johnson S., *Unbundling institutions*, 2005, Journal of Political Economy Vol. 113, No. 5, at 949-95.

<sup>32</sup> Greif, A., *Commitment, Coercion, and Markets - The Nature and Dynamics of Institutions Supporting Exchange*, 2005, In: Ménard, Claude and Mary M. Shirley: *Handbook of New Institutional Economics*, Heidelberg; Nenovsky, N., *On Money as an Institution*, 2009, ICER Working Paper No. 12 at 1 - 19.

<sup>33</sup> Beck, T., et al, *New Tools and New Tests in Comparative Political Economy: The Database of Political Institutions, Regulation and Competition Policy*, 2002, Development Research Group, World Bank, Washington, D.C.; Shleifer, A., et al, *The New Comparative Economics*, 2003, World Bank Policy Research Working Paper No. 3054.

<sup>34</sup> Acemoglu and Johnson, note 31.

<sup>35</sup> Knack, S., and Keefer, P., *Social Capital, Social Norms and the New Institutional Economics*, 2005 in: Ménard, Shirley (2005): *Handbook of New Institutional Economics*

<sup>36</sup> Grier, R., *Colonial Legacy and Economic Growth*, 1997, Public Choice 98 at 317-335.

<sup>37</sup> Rodrik, D., *Second-Best Institutions*, NBER Working Paper No. 14050 June 2008 JEL No. O1.

institutions and structures to set them in motion and operationalise the processes, guiding and oiling their wheels towards sustainability. Institutions through their interactions stimulate private investment, ensuring security of those investments and the return thereof, in addition to guaranteeing against expropriation.<sup>38</sup> On the other hand, their absence triggers the diversion of otherwise investable funds into self-help efforts aimed at securing the goods resulting from the investment.<sup>39</sup>

The question as to whether institutions matter in development has taken centre stage in a number of studies and cross-country analyses beginning in the 1990s with the Governance Group at the World Bank that initiated the World Bank's Worldwide Governance Indicators Project. These studies showed strong correlations and indeed strong causal relationships between institutional quality and the development of the nations reviewed.<sup>40</sup> A recent study by Rodrik, Subramanian and Trebbi evaluated the contributions of institutions, geography and international trade as a yardstick in judging income levels around the world. The outcome was that the quality of institutions determined the income levels between nations.<sup>41</sup>

Within the Nigerian context, the relevance and centrality of institutions to development is clear when one undertakes a close look at her developmental path since Independence. It shows that Nigeria's present deplorable economic state is not due to lack of good plans as there have been several national development plans since independence.<sup>42</sup> What has been wrong is the non-implementation of Development

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<sup>38</sup>Mijiyawa, note 24.

<sup>39</sup>Ibid at 10; Hall, R.E., and Jones C.I., *Why do some Countries Produce So Much More Output per Worker than Others?*, Quarterly Journal of Economics, CXIV, 83-116.

<sup>40</sup>The World Bank Group, *Worldwide Governance Indicators*, in Trebilcock and Prado, note 16 at 34.

<sup>41</sup>Rodrik, D., et al, *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development*, 2004, 9, Journal of Economic Growth at 131.

<sup>42</sup>Obadan, M.I., *Past Development Plans In Nigeria: Performance, Problems and Prospects*, 2011, Commissioned Paper Presented at the 52nd Annual Conference of the Nigerian Economic Society, Covenant University, Ota, September 20-22; Obadan, M.I., *National Development Planning and Budgeting in Nigeria: Some Pertinent Issues*, 2003, Lagos: Broadway Press Ltd; Ibi-Ajayi, S.I., *Institutions, the Missing Link in the Growth Process*, 2002, Presidential Address, Ibadan: Nigerian Economic Society; Bertocchi, G., and Guerzoni, A., *Growth, History or Institutions? What Explains State Fragility in Sub-Saharan Africa*, 2010, IZA Discussion Paper, No. 4817; Fosu, A.K. *Democracy and Growth in Africa: Implications of Increasing Electoral Competitiveness*, 2008, Economics Letters, Vol.100: 442-444.

Plans because of institutional fragility and incapacity. This evaluation has been validated by an African Development Bank commissioned study<sup>43</sup> that concludes that the reason for Nigeria's low economic development outcomes is not essentially related to failing to plan or planning to fail, but as a result of weak institutional frameworks. The African Development Bank Study concludes that National Development plans were not backed up with institutional support and were therefore not implemented or done haphazardly.

There is therefore an urgent need to evaluate the institutional fabric and strengths of the economic, political, and other supporting institutions implicated in Nigeria's poor economic outcomes.

Even though there is no one set of institutions that are prerequisites for the proper functioning of the IRA model in any nation, there has been a consensus among development economists and lawyers<sup>44</sup> about five main types of such institutions. They act as enablers, giving foundational support for the economic progress of nations, and by necessary extrapolation, facilitate the proper functioning of IRAs. These include political and supporting institutions, property rights, and their supporting institutions. This chapter discusses the first set of institutions while Chapter 4 discusses the others. Before undertaking a discussion on the present institutional fabric of Nigeria's political and other supporting institutions, it is necessary to have an overview of the nature of institutions that pre-dated independence. This evaluation will indicate how those erstwhile institutions shaped post-colonial political, economic and supporting institutions.

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<sup>43</sup>African Development Bank Working Paper No. 162 December 2012.

<sup>44</sup>Rodrik note 37; Rodrik, D., *Institutions for High-Quality Growth: What They are and How to Acquire Them*, BER Working Paper No. 7540 Issued in February 2000, NBER Program(s): EFG; Rodrik, D., and Subramanian, A., *Why did Financial Globalization Disappoint?* Harvard University Research Papers, March 2008; Rodrik, D., and Subramanian, A., *The Primacy of Institutions, Finance and Development*, June 2003 at 32.

### 3.5 The State of Institutions in Nigeria – Before Independence

The period Nigeria spent under colonial rule is a little less in time than the period since independence. However, the effects of colonial rule on her political economy are still strong. The institutions that existed at independence were of colonial pedigree or built upon the foundations of colonial rule. Thus, what exists today is a reflection of what predated independence.

Although by the 19th Century, democratic values including the rule of law, property rights, and a free press were blossoming in Europe, the colonial government in Nigeria made no effort to transplant them into Nigeria. The atmosphere did not encourage the existence of institutions that espoused rule of law principles such as court systems and equality before the law. This robbed the newly independent nation of knowledge and experience in basic rule of law concepts.<sup>45</sup>

The institutional structures that survived the departing colonial government were at best inefficient, disorganised and weak.<sup>46</sup> Mkapa argues that this was convenient for the departing colonial administrators, as they would look back and point to the inability of the “locals” to govern themselves. It also created a “perfect environment for the political and economic advantage of colonial powers to persist.”<sup>47</sup>

At independence therefore, there was a palpable lack of a trained work force to take over the leadership roles relinquished by the departing colonial administrators. Educating Nigerians beyond basic literacy levels during the colonial era was not the priority of the colonial government. The colonial government consigned the provision of basic education to Christian missionaries who produced clerks and messengers needed for the lower echelons of colonial administration. Where Nigerians had the

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<sup>45</sup> Mkapa, B.W., *Leadership for Growth, Development and Poverty Reduction: An African Viewpoint and Experience*, in Brady, D., and Spence, M., eds, *Leadership and Growth*, Commission on Growth and Development, International Bank for Reconstruction and Development, 2010 at 51.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid at 25; Elley, T.K, *Why Africa Fails: The Case for Growth before Democracy*, Tafelberg, NB Publishers, Cape Town, RSA at 94.

opportunity to pursue education past the basic literacy levels, the quality was not of the standard required to attain senior administrative roles. The perpetuation of the colonists' post-independence political and economic interests was the ultimate goal.<sup>48</sup> Where there were attempts made by the international community led by the United Nations to build capacity through scholarships for Nigerians to study abroad, these efforts were frustrated by the colonial government.<sup>49</sup>

In addition, the nature of institutions set up by the colonial government was extractive in nature,<sup>50</sup> and did not guarantee protection for property rights, neither were there governance structures that provided checks and balances against the government in favour of the people.<sup>51</sup> The overriding aim of the colonialists in setting up institutions was for the extraction of raw materials and cash crops.<sup>52</sup>

On another level, Acemoglu and Robinson<sup>53</sup> have argued persuasively that a crucial determination as to whether institutional structures were a priority of the colonial government had much to do with the disease profile of the area. In high mortality regions that had tropical diseases, colonists tended to set up centralised state apparatus and other associated institutions (as opposed to elaborate decentralised systems) to facilitate the extraction of raw materials and cash crops. Nigeria was one of such regions, in that the occurrence of malaria posed a major disincentive for investing time and funds to spread out well-kitted institutions.

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<sup>48</sup> Omoregie, F.N., *Rodney, Cabral and Ngugi as Guides to African Postcolonial History*, 1999, in African Postcolonial Literature in English, University of Botswana, [www.postcolonialweb.org/africa/omoregie11](http://www.postcolonialweb.org/africa/omoregie11).

<sup>49</sup> Mkapa, note 45 at 30.

<sup>50</sup> Ann and Robert Seidman, *Law and the Crisis in Africa in The Rule of Law and Economic development: Fundamental Insights and Institutional Designs for Economic Development of Nigeria* in Amadi, S., Nigerian Bar Association Policy Paper, June 2008 at 57.

<sup>51</sup> Acemoglu, D., Robinson, J., *The Role of Institutions in Growth and Development*, in Brady, D., and Spence, M., eds, *Leadership and Growth*, Commission on Growth and Development, International Bank for Reconstruction and Development, 2010 at 135 – 164.

<sup>52</sup> *Ibid*, at 135–164.

<sup>53</sup> *Ibid*.

This was essentially the outlook of Nigeria's institutional architecture before and at independence and may in fact have a bearing on the manner in which institutions evolved after Independence.

This thesis will now undertake a discussion on political institutions and their viability to undergird IRAs.

### **3.6 Political Institutions**

To provide a guide as to which institutions can be termed political, this thesis adopts a functional approach. Rather than say what they are, the thesis identifies them by their function or the outcome of their interactions in the nation's polity. Drawing from the earlier definition of institutions,<sup>54</sup> they are those institutions that constrain and shape human interactions in political matters and affairs within a body politic.

Political institutions permit the design of fair and efficient rules that ensure the even-handed, consistent enforcement and adjudication of those rules that in turn define the particular social economic, historical, and cultural peculiarities of a country.<sup>55</sup> In addition, they determine both the "constraints and incentives faced by key players in a given society."<sup>56</sup> It is thus evident that the extent of a nation's economic progress and by extension the establishment of the IRA model, hinges upon the presence and responsiveness of political institutions to the overall interests of the social, economic, and political actors.<sup>57</sup>

Political institutions have the crucial role of igniting economic growth. The political process is essentially the manner by which a society chooses the rules that will govern it and thus political institutions are the agents that are utilised to constrain and

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<sup>54</sup> North et al, note 8.

<sup>55</sup> Lora, note 12.

<sup>56</sup> Pereira, C., and Teles, V., *Political Institutions, Economic Growth, and Democracy: The Substitute Effect*, Brookings Newsletters, January 19, 2011.

<sup>57</sup> Jutting, note 25.

allocate these powers.<sup>58</sup> These in turn have an overarching bearing on economic development and by extension the thriving of the IRA model of regulatory governance. It is instructive to note, in underlining the primacy of political institutions to development, the fact that most of the rich countries in the world are democracies and most of the poorest countries are not, or have not been for most part of their histories. Thus, what countries end up becoming is a product of their political system and the calibre of their leadership and institutions.<sup>59</sup> There are at least seven reasons for this.

First, political institutions distribute power among different tiers of government and embed an apparatus of coercion and implementation. As a distinction, economic institutions do not have a life of their own – they derive their authority and very existence from “igniting” decisions from political institutions. In the reasoning of Rodrik,<sup>60</sup> one of the functions of political institutions is to initiate the process that brings into being economic institutions, and it is only afterwards that economic institutions get “born” to propel and sustain economic development.<sup>61</sup>

Second, several economists have validated the important role of political institutions in economic growth and the viability of IRAs.<sup>62</sup> They have linked the different incidents of political instability as an undermining factor to economic growth. Several variables such as revolutions, assassinations, deaths, coups (successful, abortive and officially reported), demonstrations, regime change, regular and irregular transfer of executive power, and war, among others, have been identified as proxies to political

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<sup>58</sup> Rodrik, D., *Growth Strategies*, in P. Aghion and S. Durlauf, eds., *Handbook of Economic Growth*, North-Holland, 2004; Acemoglu and Robinson, note 31 at 79

<sup>59</sup> For the African experience: Meredith, M., *The Fate of Africa- A History of Fifty years of Independence*, (New York), NY: Public Affairs, 2005; for the Latin American experience: Reid, M., *Forgotten Continent* (New Haven, CT: Yale University Press, 2007; and for the Asian experience: Pei, M., *The Puzzle of East Asian Exceptionalism*, 5.4, 2005, *Journal of Democracy*, 90.

<sup>60</sup> Rodrik, note 37.

<sup>61</sup> Mijiyawa, note 34.

<sup>62</sup> Barro and Lee in Nkurunziza, J.D and Bates, R.H, *Political Institutions and Economic Growth in Africa*, Centre for International Development at Harvard University, Working Paper No. 98, March 2003.

instability that undermine political institutions. This in turn has a direct bearing on economic stability as political instability within institutions affects economic stability.<sup>63</sup>

Third, the extent to which political institutions favour and work for production instead of the diversion of resources and rent- seeking determines a nation's vibrancy. When diversion occurs, fallouts ensue such as “corruption, theft, the payment of protection money, confiscatory taxation, the lobbying of government by special interests.... All these act like taxes on businesses, reducing their expected profitability.”<sup>64</sup> This in turn has disastrous consequences on economic growth. Governments, through political institutions, are usually implicated in these acts as either active participants or one that acquiesces “through the structure of incentives it puts in place.”<sup>65</sup>

Four, instability in the political environment typically heightens uncertainty and hinders investment.<sup>66</sup> It is a given that governments exist to provide an environment conducive for economic activities to take root and thrive. Where this is lacking, political institutions are implicated as the culprit, hence their centrality to economic development.

Five, with particular relevance to Africa and Nigeria, the AERC Africa Growth Project survey of 30 countries indicated that politics and political institutions overrode all other kinds of institutions in outcomes.<sup>67</sup> This further validates the importance of political institutions to economic growth and the viability of IRAs.

Six, an exploration of the relationship between political institutions and economic performance, at both the macro- and micro-levels, has shown that changes in

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<sup>63</sup>Nkurunziza, J.D and Bates, R.H, *Political Institutions and Economic Growth in Africa*, Centre for International Development at Harvard University, Working Paper No. 98, March 2003 at 8.

<sup>64</sup>Ibid.

<sup>65</sup> Easterly, W., *An Elusive Quest for Growth*, Cambridge: 2001, MIT Press.

<sup>66</sup> Aisen, A., and Veiga, F.J., *How Does Political Instability Affect Economic Growth?* International Monetary Fund Working Paper, WP/11/12, January 2011 at 3

<sup>67</sup> African Economic Research Consortium: Plenary Session December 2011.



national political institutions towards greater democracy in Africa are strongly associated with economic well-being.<sup>68</sup>

Seven, it is historically acknowledged that almost all of Africa's economic problems have roots in or are a direct fallout from political disputes<sup>69</sup> and it is in cases where political institutions fail to resolve disputes that crisis erupts. In the words of Adebayo Adedeji, former Secretary- General of United Nations Economic Commission for Africa, "people will never comprehend Africa's crisis so long as they continue to assume that it is an economic one. What we confront in Africa is primarily a political crisis, albeit with devastating economic consequences."<sup>70</sup>

The fact that politics and political institutions account for developing countries' and particularly Nigeria's economic woes had until recently been lost on the intermediating agencies that had so forcefully argued for the wholesale implementation of market reforms. The pattern has been that as a build up to the reform prescriptions from these agencies, emphasis was placed on economic aspects of the nation and little on political institutions. It was only in 1999 that the World Bank, through its then President, Mr. Wolfenson, admitted that it erred in paying too much attention to economic sectors and ignoring other institutional problems.<sup>71</sup>

All this shows the primacy of political institutions in and over other institutions in securing economic prosperity of any nation. As Acemoglu and Robinson have shown,<sup>72</sup> political institutions in a nation determine the types and extent of authority of economic institutions. While economic institutions regulate the market place (business environment) determining the rules for entry and exit, it is the political institutions that

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<sup>68</sup>Bates R. H. et al; *The New Institutionalism and Africa*, Journal of African Economies, Vol. 22. (4) 2013 at 499-522; Fosu, A.K., *Institutions and African Economies*, Journal of African Economies Volume 22, Issue 4 at 491-498.

<sup>69</sup>Ayittey, G.B.N, *How the Multilateral Institutions Compounded Africa's Economic Crisis*, 30 Law and Policy International Business, 1998-1999 at 585-600; Guttsman, J., *World Bank Admits It Erred in Handling Asian Crisis*, Wash. Times, Feb 22, 1999 at A17 in 30 Law and Policy International Business 1998-1999 at 596.

<sup>70</sup>Ibid.

<sup>71</sup>Ibid.

<sup>72</sup>Acemoglu and Robinson, note 31.

first determine if they (economic institutions) will exist at all and the extent of their powers. As a result of their critical importance to a nation's development all the political institutions were designed by the 1999 Constitution to be independent of<sup>73</sup> and operate at arm's-length from one another, with their boundaries spelt out, each providing checks and balances on the other.

Having established the relevance of political institutions to economic growth and the proper functioning of IRAs, we shall now discuss their interplay within the Nigerian context. The political institutions for discussion include the Executive, Legislature, Judiciary, and the Electoral Agency.

### **3.6.1 The Executive**

Under section 5(1) (a) of the 1999 Constitution, the executive powers of the Federation are vested in the President who may exercise them directly or indirectly through his Vice President and ministers of the government of the federation or through other officers in the public service of the federation. These powers, by virtue of clause (b) of the same section include the execution and maintenance of the Constitution of Nigeria and all the valid laws made by the National Assembly. From the wordings of the Constitution, the presidential powers are essentially delegated responsibilities from the National Assembly to the President and this underlines the stewardship nature of the duties of the President.

Notwithstanding the custodial nature of the presidential powers and the explicit adoption of the age-long concept of Separation of Powers by the 1999 Constitution, the Executive arm has, since the return to democratic rule, had a domineering presence over the other arms of government. This dominance has extended to the arms of government and other critical democratic supporting institutions.<sup>74</sup> This invalidates the

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<sup>73</sup> Sections 4, 5 and 6 of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>74</sup> Baba, Y.T., *Executive Dominance, Party Control and State Legislatures in Nigeria: Evidence from Three States in the North-west Geo-political Zone of Nigeria*, Paper presented at a Workshop Organized by Landmark

reasoning behind the concept of a presidential democracy analysed in writings by early democratic theorists,<sup>75</sup> particularly Montesquieu, who cautioned against the accumulation of executive, legislative and judicial powers in one hand (whether of an individual or institution, majority or minority) as it leads to tyranny.<sup>76</sup>

Tensions have repeatedly sprouted in the power inter-play between the different arms of government and supporting institutions with one recurring *dramatis personae* : the Executive has always been at the one end seeking to control the others. Since the return to democratic rule, the most frequent source of disagreement between the Executive and the Legislature has been the attempt by the former to dictate to the latter who emerges as its Presiding Officers.<sup>77</sup> Unlike in mature democracies where disputes that often arise between the Executive and other branches of government, particularly the legislature, border on policy issues, in Nigeria almost all the disagreements hinge on personal contestations.<sup>78</sup> These tensions have undermined the institutionalisation of a democratic ethos in Nigeria. Several reasons account for this cat-and-mouse relationship by the Executive with the other political actors.

First, legislative experience, which is an invaluable strength in enabling legislative bodies in other democracies to assert their independence, is lacking in Nigeria due to the long period of military rule. All military regimes on assumption of power suspend the Constitution and disband the Legislature. Thus, the experience the legislature accumulated from the First Republic in 1960 to 1966 was wiped off by the 1966 coup and was not restored until 1979. Again, it was interrupted from 1984 until the last return to civilian rule in 1999. These interruptions led to the underdevelopment of the capacity of members and their supporting bureaucracies.<sup>79</sup> On resumption, each

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University on the theme: African State Legislatures: Subnational Politics and National Power, January 7-8, 2014 at 6.

<sup>75</sup> Montesquieu, *The Spirit of the Laws*, 1750; Madison in *Federalist Paper*, No.47, 1788; Madison, J.A. Hamilton and J. Jay (1987) *The Federalist Papers*, Hammondsworth, Middlesex Penguin.

<sup>76</sup> Ibid.

<sup>77</sup> Baba, note 74 at 21.

<sup>78</sup> Ibid, at 7.

<sup>79</sup> Ibid.

legislative session always began on a new slate, drawing staff from the Executive bureaucracy, unschooled in legislative nuances and matters.

Second, while the legislative experience was truncated, that of the Executive bureaucracy remained intact, except for a change of personalities in the top echelons. With that, the Executive arm continued to garner uninterrupted experience over a long period of time that places it in a better position than that of the legislative arm.

Third, the lack of capacity amongst members of the Legislative arm is glaring. The minimum constitutional requirement for elections into the legislative arm is the possession of a Secondary School Certificate.<sup>80</sup> With the present crisis in the educational sector and the churning out of ill-prepared school leavers because of incessant strikes and school closures, the quality of the School Certificate does not offer the promise<sup>81</sup> of sufficiently qualified legislators. Legislative functions are multifaceted, multi-disciplinary, and technical, placing weighty demands on legislators to be conversant with different areas and fields of human endeavour. A level of education higher than secondary school is certainly required to discharge the law-making responsibility effectively.

Fourth, the frequent turnover of legislative members during elections, mostly under the politically crafted policy of Federal Character<sup>82</sup> in the Constitution, while having its merits, has the major drawback of robbing the legislature of the experience garnered by members in the preceding Assembly. This high turnover of Legislators in

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<sup>80</sup> Section 65 (2) of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>81</sup> Dike, V., *The state of education in Nigeria and the health of the nation*, Africa Economic Analysis, <http://www.afbis.com/analysis/education10204234737.htm>.

<sup>82</sup> Section 14 (3) of 1999 Constitution provides that "The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that Government or any of its agencies."

Nigeria, said to be the highest in the world, has a negative impact on “its institutional capacity, thus, affecting the development and deepening of democracy.”<sup>83</sup>

Fifth, the lack of financial independence of the legislative and judicial arms of government has played a large part in their poor performance. Where the Executive controls the purse strings and releases money when it chooses to and in what quantity, the other arms of government are pushed to play to the 'piper's tune'.

Sixth, the skewed method of appointment, promotion, and discipline in the judicial arm tilts the balance in favour of the Executive, which utilises it as a veritable bargaining chip to control the other arms of government.

Numerous scholars have situated the dominance and over-bearing tendencies of the Executive within the background of military dictatorships that thrive on a culture of arbitrariness, coercion and impunity.<sup>84</sup> The domination of the other arms of government by the Executive arm is however a global trend and not peculiar to Nigeria.<sup>85</sup> What calls for apprehension in the Nigerian context is the extent to which the Executive goes in overreaching and dominating the other arms. In the process, illegal means are employed such as force, threats and abuse of state security apparatus to harass and beat opponents into line.<sup>86</sup> Coincidentally, these actions by the Executive, along with the increasing irrelevance of the Parliament by their actions and inactions as a watchdog,

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<sup>83</sup> Communiqué of the National Institute for Legislative Studies Two-day workshop held in Ilorin on how to minimise conflict between the Executive and Legislature reported in ThisDay Newspaper, Nigeria, 14 April 2013.

<sup>84</sup>Ogbonnaya et al, *The Challenges of Democratic Governance in Nigeria's Fourth Republic*, Mediterranean Journal of Social Sciences, Vol. 1 (11) November 2012 at 690.

<sup>84</sup>Bankole D., *The Role of the Legislature in the Consolidation of Democracy in Nigeria*, in *The Challenges of Democratic Governance in Nigeria's Fourth Republic*, Ogbonnaya et al, in Mediterranean Journal of Social Sciences, Vol. 1 (11) November 2012 at 690.

<sup>85</sup>Corder, H., *Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa*, 5 S. Afr. J. on Hum. Rts. 1 1989 citing Schwartz and H W R Wade *Legal Control of Government* (1972) Ch 1; H W R Wade *Administrative Law* (1982) Ch 1.

<sup>86</sup> Baba, note 74.

highlight the real potential of the judiciary being the only source to provide a check on the seeming Executive lawlessness.<sup>87</sup>

### 3.6.2 The Legislature

The role of the Legislature in the Nigerian political setting is unique as it has the responsibility of making laws upon which the country's direction will be determined. The totality of all laws that ensure good governance, economic well-being, social justice, equity, security, the provision of critical infrastructures, and social services are within its purview. In addition, the Constitution grants to them the power to ensure the implementation of laws, a function also referred to as oversight powers.<sup>88</sup> This watchdog function according to Verney<sup>89</sup> is perhaps more important for a legislative assembly than that of law making as it ensures accountability and holds the implementation organ, the Executive, to good governance.

Furthermore, the power of appropriation, which entails approval of budgetary estimates submitted by the Executive, offers a valuable window through which the Legislature can shape, influence, direct and sustain reforms of a fundamental nature.<sup>90</sup> This power, also referred to as the "power of the purse"<sup>91</sup> has a definite role, if applied judiciously, in exerting administrative control over the dispensers of the purse, the Executive to attain the developmental needs of society.<sup>92</sup>

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<sup>87</sup> Constitutionalism appears to be labouring under the same situation in the South Africa context as stated by Prof Hugh Corder in 5 S. Afr. J. on Hum. Rts. 1 1989.

<sup>88</sup> Section 88 of the 1999 Constitution.

<sup>89</sup>Verney, D. V. *Structure of Government*, 1969 at 167, In J. Blondel (ed), *Comparative Government: A reader*. London, Macmillan.

<sup>90</sup>Fashagba, J.Y., *The Nigerian Legislature and Socio-political Re-engineering in the Fourth Republic*, A Workshop on Nigeria's Transformation through Representation and Revenue Panel discussion during the American Political Science Association's Annual Meeting held on Friday, August 31, 2012 at 2:00 pm at Nottoway room of the Sheraton New Orleans, USA.

<sup>91</sup>Saffell, D. C., *Essentials of American government: Change and Continuity*, 1989, Pacific Grove, CA, Brooks/Cole at 69.

<sup>92</sup> Esebagbon, in Baba note 75 at 14.

There is agreement that the legislative arm has been unable to rise to the occasion in Nigeria's political climate and its performance since the return to democratic rule in 1979 has been lacklustre.<sup>93</sup> Several instances lend credence to this consensus.

The legislative arm has used the power to make the laws on appropriation as a tool for the furthering of private interests and not for the public good. There have been allegations that most Committees of the National Assembly negotiate and “build in” commissions, bribes and pay offs for themselves in amounts appropriated for government agencies.<sup>94</sup> The legislators thereafter, on passage of the appropriation bill, embark on oversight visits to those concerned agencies to demand and receive the padded portion of the budget. The motivation to serve has therefore not been the driving force for legislation but that of personal interests.<sup>95</sup>

Secondly, even as it relates to the core function of appropriation, its performance has been below expectations. The pattern has been the same: year after year, appropriation budgets that contain the details of expenditure by government are passed into law well into the year in question rather than at the end of the preceding year. This has inevitably led to the absence of, or at best haphazard implementation of budgets. This dovetails into non-provision of critical infrastructure as witnessed by the presence of thousands of governments projects abandoned around the country.

Thirdly, the power of oversight given to the Legislature by the Constitution to enhance accountability and transparency in the conduct of public affairs and in the

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<sup>93</sup>Anyaegbunam, E. O., *Law Making and the Enabling Legal Framework in Nigeria: Critical Overview*, 2012, NAILS International Journal of Legislative Drafting (NIJLD). 1(1), 54-72; Lewis, P. & Alemika, E., 2005, *Seeking the Democratic Dividend: Public Attitudes and Attempted Reform in Nigeria*, Afrobarometer Working Paper No. 52; Bamidele, A.M., and Alaba, E.V., *Performance Evaluation of the National Assembly Input in Nigeria's Democracy 2007 – 2011*, International Journal of Humanities Social Sciences and Education (IJHSSE) Volume 1, Issue 3, March 2014, PP 47-55 ; Agba, M.S.et al, *Politics and Administrative Responsibility in Nigeria: An Assessment of Legislative Mandate Performance and Executive Implementation of Public Programmes*, Journal of Good Governance and Sustainable Development in Africa, Vol. 2, No 1, Jan., 2014; Yagboyaju, D.A., *Nigeria's Fourth Republic and the Challenge of a Faltering Democratization*, African Studies Quarterly, Volume 12, Issue, Summer 2011 at 95 at 99.

<sup>94</sup>Wuyi O. and Oduntan. T., *Budgeting for the Military Sector in Africa*, 2006, Stockholm International Peace Research Institute at 163.

<sup>95</sup> Yagboyaju, note 93 at 100.

management of public resources has been betrayed. This function is akin to the supervision and control of other government agencies.<sup>96</sup> Sadly, the exercise of the power has been used to achieve personal aims and agendas of members of the legislature.

Thus, notwithstanding the institutional powers the Constitution has bestowed on the Legislature, it has been unable to utilize them to enact laws for the well-being, economic prosperity and security of the citizenry, or to monitor, under the power of the purse rule, Executive spending to ensure probity and accountability.<sup>97</sup> It is thus unsurprising that the legislative arm of government is derogatorily referred to as mere “rubber stamps” of the Executive, a badge that would make the founders of the presidential democratic model turn in their graves!<sup>98</sup>

### 3.6.3 The Judiciary

Throughout the evolution of the modern state, there has been an acknowledgement of a strong linkage between economic growth and law. Adam Smith, the father of capitalism, not only believed in but argued that economic growth and development are only achieved where there are firm roots in norms and laws to undergird the process and further associated economic stagnation and underdevelopment with the “imperfection of the law and uncertainty in its application.”<sup>99</sup>

An overview of the various theories of economic development, from the modernist or dependency theory to the neo-liberal market theory, have all pointed out the legal system as a vital component critical to economic development.<sup>100</sup>

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<sup>96</sup> Baba, note 74 at 17.

<sup>97</sup>Wuyi and Oduntan, note 94 at 175; Baba note 74 at 2-3.

<sup>98</sup> Ibid at 19.

<sup>99</sup>Arewa, J.A., *Judicial Integrity in Nigeria: Challenges and Agenda for Action*, Judicial Reform and Transformation in Nigeria: A tribute to Hon. Justice Dahiru Musdapher, eds, Azinge, E and Dakas, C.J., 2012, Nigerian Institute of Advanced Legal Studies.

<sup>100</sup>DeSoto, H., *The Other Path: The Invisible Revolution in the Third World*, 1989, Harper Collins; Webb, D., *Legal System Reform and Private Development in Developing Countries*, 1996 in R. Pritchard (ed.), *Economic*



Following from this, economists, historians, sociologists, and legal scholars have underscored the centrality of the legal system to economic development. Ann and Bob Seidman,<sup>101</sup> in commenting on the truncation of economic development in Africa, note that African leaders and legislators have failed to utilize the instrument of law to reorder and transform colonially tainted institutions and reposition them. Hernando Desoto in his classic, *The Mystery of Capital*<sup>102</sup>, placed underdevelopment squarely at the doorsteps of the inability of Third World nations to use legal systems and institutions to unlock the abundant “dead capital” that abounds in their territories. Several recent studies and reports agree on the correlation between effective legal systems and economic growth<sup>103</sup>, while surveys have indicated the “deleterious effects of weak judiciaries on economic expansion.”<sup>104</sup>

What then, is the role of the judiciary and the law, its systems, processes, and institutions in economic development? Why deem them necessary for economic growth and development? How are they relevant to the thriving of the IRA model?

While to Amadi<sup>105</sup> law “undergirds the economy”, Arewa opines that law and its institutions control human conduct towards productive channels, without which there will be no sustainable development.<sup>106</sup> Law and justice have in fact been considered the “life blood of every society” and a threshold by which economic development is

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Development, Foreign Investment and the Law, London: Kluwer; Davis, E.K and Trebilcock, M., *Legal Forms and Development*, Third World Quarterly, 2001, Vol. 22, No 1 at 21-26; Ogus, A. *Towards Appropriate Institutional Arrangements for regulation in Less Developed Countries*, Centre on Regulation and Competition, Working Paper Series, Paper No. 119, June 2005 at 2.

<sup>101</sup> Ann and Robert Seidman, *Law and the Crisis in Africa in The Rule of Law and Economic development: Fundamental Insights and Institutional Designs for Economic Development of Nigeria* in Amadi, S., Nigerian Bar Association Policy Paper, June 2008 at 57.

<sup>102</sup> DeSoto H, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Elsewhere*, Basic Books, 2000.

<sup>103</sup> Feld, Lars P., and Stefan Voigt., *Making Judges Independent – Some Proposals Regarding the Judiciary*. 2004, Working Paper 1260. Munich: CESifo (April); Islam, R., *Institutional Reform and the Judiciary: Which Way Forward*. 2003, Policy Research Working Paper, 3134, Washington: World Bank (September) at 7- 8; Dam, K.W., *The Judiciary and Economic Development*, 2006, John M. Olin Law & Economics Working Paper No. 287, 2D Series; Amadi note 45 at 60.

<sup>104</sup> World Bank, *World Development Report 2005: A Better Investment Climate for Everyone*. New York: World Bank and Oxford University Press at 86.

<sup>105</sup> Amadi, note 50.

<sup>106</sup> Arewa, note 99 at 233.

measured. Where it is in short supply, the society will “inevitably witness strife, anarchy, fear, discord, social and economic disharmony<sup>107</sup>”

On a functional note however, law and its institutions play a central role in economic development. In the normal interaction of economic agents in the market place, there are bound to be disputes, and the primary purpose of the law and its institutions is to provide an impartial and reliable dispute resolution avenue. This accentuates economic progress by enforcing and securing contracts and property rights,<sup>108</sup> guaranteeing creditors the repayment of loans,<sup>109</sup> and protecting corporate shareholders,<sup>110</sup> which in turn encourages investments and confidence in the predictability of investments and transactions. Furthermore, the role of the Judiciary extends to providing assurance for both a nation’s citizens and foreign investors against unlawful appropriation of investments.<sup>111</sup> In addition, judicial systems help shore up economic performance by correcting various market failures and imposing constraints on actors within the market space.

In summary therefore, the law and its institutions perform four central functions from the point of view of economic development: they protect the rights to private property; they establish rules for negotiating and selling these rights among private parties themselves and the State; they define rules for market access and departure; and they promote competition and regulate conduct in the sectors where there is a monopoly or little competition.<sup>112</sup>

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<sup>107</sup> Welcome Address by Okey Wali, SAN, President of the Nigerian Bar Association at the Opening Ceremony of the NBA Judiciary Committee, Judicial Reforms Conference held at Transcorp Hilton Hotel, Abuja, on 7th July, 2014.

<sup>108</sup> Keefer, P. & Knack, S., *Why Don't Poor Countries Catch Up? A Cross-National Test of Institutional Explanation*, 1997, *Economic Inquiry*, 35 at 590-602.

<sup>109</sup> Levine, R., *Law, Finance and Economic Growth*, *Journal of Financial Intermediaries*, 1999, 8: 8-35.

<sup>110</sup> La Porta, R., et al, *Law and Finance*, *Journal of Political Economy*, 1998, 106: 1113-1155.

<sup>111</sup> Stephenson, M.C., *Judicial Reform in Developing Economies: Constraints and Opportunities*, Harvard Law School, Annual World Bank Conference on Development Economics, 2007.

<sup>112</sup> Saddi, J., *The connection between the judiciary and credit as an instrument of national development: the case of Brazil*, Centre for Brazilian Studies, University of Oxford, Working Paper Number CBS-82-07, 2007.

Conversely, an inefficient judicial system has major negative consequences for a nation's economic performance in a number of ways. Apart from increasing the cost of doing business by forcing players to resort to alternative avenues to enforce contract rights, it makes players ultimately opt out of the market place as a result of the disincentives; while at the same time promoting corruption.<sup>113</sup>

### 3.6.3.1 *The Judiciary in the Nigerian Context*

The Constitution underscores the importance of law to economic development and its centrality in determining State Policy. The Fundamental Objectives and Directive Principles of State Policy in Chapter 2<sup>114</sup> list the legal imperatives the State must follow in conducting and regulating economic activities.

Secondly, Section 6 vests judicial powers in the courts, which encompasses the judicial systems and institutions. It specifies the judiciary as the avenue for the determination and resolution of disputes between parties and the State and extends to ensuring that all affairs of the State are conducted in accordance with the law.

Although independence of the judiciary is enshrined in the 1999 Constitution, the practice in Nigeria has been different. The performance of the judiciary since independence has followed a downward trend leading to the "grievous erosion of fundamental rights, particularly, socio-economic rights; stultification of growth, development and sustainable human development."<sup>115</sup> It has so far unwittingly delivered itself into the hands of politicians and political parties as a tool in the pursuit of personal interests. This has manifested in a number of ways including delays in the administration of justice, corruption, a lack of independence, and the under-funding of the judiciary. A consideration of the factors that have been responsible for the sub-optimal performance of the Judiciary will now be undertaken.

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<sup>113</sup>Jindia, J.R., *Role of the Judicial System in the Economic Development of India: Slowness in the judicial system reduces economic growth*, Cultural Streams International, 5/18/08.

<sup>114</sup> Section 16 of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>115</sup>Arewa, note 99 at 242; Att-Gen of the Federation v. Att-Gen of Abia State & Ors. (2002) 4 S.C. (Pt. 1); Att-Gen of Ondo State v. Att-Gen of the Federation & Ors [2002] 9 NWLR (Pt.722) 222; Plateau State of Nigeria & Anor v. Att-Gen of the Federation & Ors [2005] 9 NWLR (Pt.931) 577.

### 3.6.3.2 *Delay*

The enduring words that “justice delayed is justice denied”<sup>116</sup> have not been heeded in Nigeria’s judicial system where inordinate delay has become the norm. The road to justice, in the words of Arewa, has become “tortuous, frustrating, slow and inefficient, resulting in high transaction cost and general disenchantment with the justice system.”<sup>117</sup> Arewa further indicates, relying on a graphic presentation by NationMaster<sup>118</sup> shown in Figures 1 and 2 below, that the typical period it takes a matter from time of filing to final judgment is about ten and a half years. When interlocutory appeals are included, an average duration of 13 – 16 years is the minimum, with most trials spanning about 20 years. The resultant lack of certainty in the settlement of commercial disputes has led to capital flight and a disincentive for Foreign Direct Investment. Furthermore, it has resulted in high transaction costs that have negatively affected productivity, sustainable economic growth, and development negatively.<sup>119</sup>

This culture of delay serves as a disincentive for the private sector when considering the important role the quick settlement of commercial disputes plays in giving comfort to investors in the enforcement of property rights. It has also engendered a culture of self- help that promotes the sense that “might is right” in the market place.

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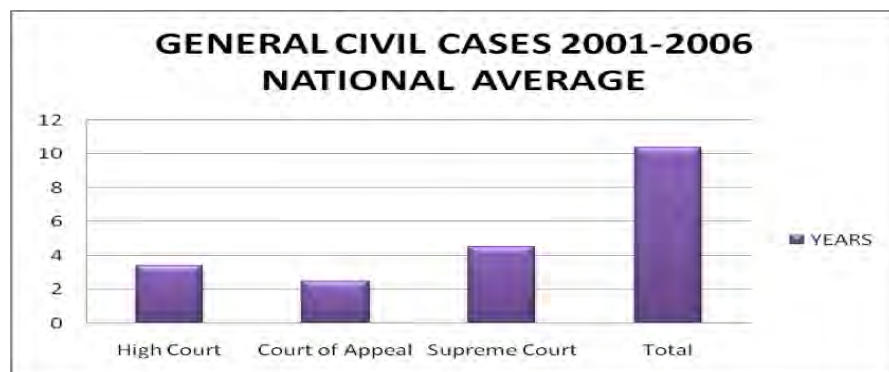
<sup>116</sup>There are conflicting records as to who first coined the phrase. According to the Dictionary of Quotations requested from the Congressional Research Service, Library of Congress, 1989 it is attributable to William Ewart Gladstone, but such attribution was not verifiable. Alternatively, it may be attributed to William Penn, although not in its current form.

<sup>117</sup>Arewa note 99 at 252.

<sup>118</sup> NationMaster.Com.

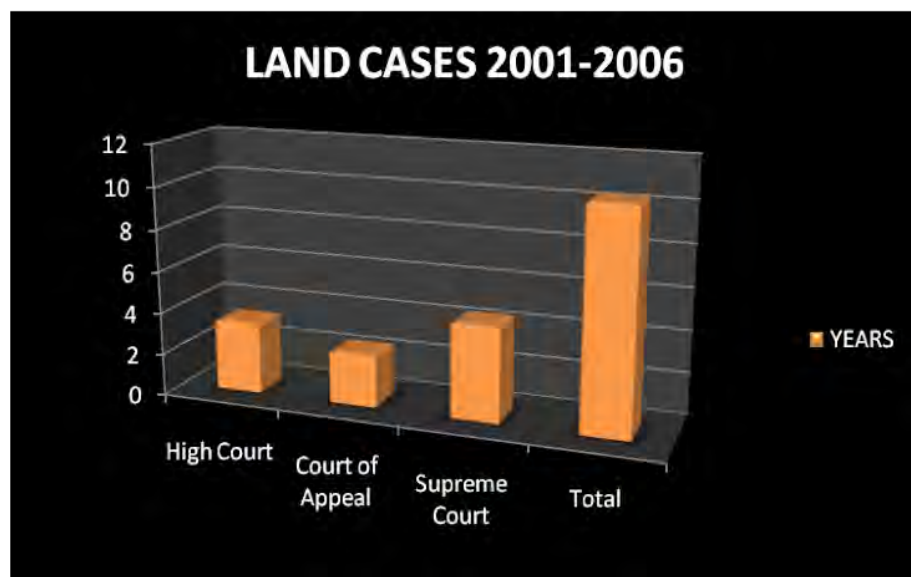
<sup>119</sup>Arewa note 99 at 252.

FIGURE 1



Source: NationMaster.com

FIGURE 2



Source: NationMaster.com

### 3.6.3.3 *Corruption*

In the very recent past, three successive Chief Justices of Nigeria and others have confirmed the existence of corruption in the Nigerian judiciary and its undermining effect in the dispensing of justice.<sup>120</sup> According to the Global Corruption Barometer 2013, the judiciary was perceived to be among the most corrupt institutions in Nigeria while the Investment Climate Statement 2013 reports that citizens face long delays and frequent requests for bribes from judicial officials to expedite cases or to obtain a favourable ruling.<sup>121</sup>

Corruption within the judiciary stems in large part from the structure of the judicial system that allows for a high degree of legal discretion that is vested in judges, which can be uncertain sometimes, capricious and open to abuse. Coupled with the multiplicity and complexity of steps required in the resolution of commercial disputes, a lack of certainty as to the extant laws, regulations and doctrines, and the haphazard and inconsistent application and interpretation of them by courts, a fertile ground has existed for corruption to thrive.<sup>122</sup> Where there is no reasonable certainty as to how disputes will be resolved, as a result of high levels of discretion, commercial disputants tend either to take the law into their hands through self-help measures or migrate their investments to environments where there is certainty and predictability.

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<sup>120</sup> Justice Kastina-Alu recently admitted that the nation's judiciary cup is half empty with respect to integrity: Quoted in Notes on Corruption and Judicial Administration in Nigeria, a speech given at the Mustapha Akanbi Foundation by Comrade Issa Aremu Mni, Vice President, Nigeria Labour Congress (NLC); Justice Dahiru Musdapher at the media roundtable on promoting ethics and integrity at the magistrate courts held at the Ikeja Airport Hotel, and organized by the Socio-Economic Rights and Accountability Project (SERAP) in collaboration with the Royal Netherlands Embassy: <http://serap-nigeria.org/breaking-news-corrupt-judge-harmful-to-nigeria-says-chief-justice-of-nigeria/>; Justice Aloma Mukhtar at the opening ceremony of a three-day Judicial Reforms Conference, with the theme: Putting Our Best Foot Forward: The Judiciary and the Challenges of Satisfying Justice Needs of the 21st Century. It was jointly organised by the Nigerian Bar Association's (NBA's) Judiciary Committee, the United Nations Office on Drugs and Crime (UNODC) and Access to Justice, with the support of Open Society Initiative for West Africa and the NJC's Performance Evaluation Committee. The USA Department of State Country Reports on Human Rights Practices also returned a verdict of corruption within the judiciary - reported in Thisday Newspaper, Nigeria <http://www.thisdaylive.com/articles/us-nigerian-judiciary-corrupt-with-impunity/116562>; Daudu, J., *The independence of the Nigerian judiciary in the light of emerging political and security challenges* Nigerian Bar Association Bar Event, Maiduguri Chapter.

<sup>121</sup> <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/nigeria/corruption-levels/judicial-system.aspx>.

<sup>122</sup> Arewa, note 99 at 250.

These extensive levels of discretion have led to varying and inconsistent decisions by different courts on matters in *pari materia* fuelled by corrupt inducements.<sup>123</sup> The tendency towards corrupt practices in the judiciary was recently showcased before the international community in a corruption trial involving a former governor. Against the tide of evidence, he was discharged by a court in Nigeria. However, a United Kingdom court, relying on the same body of evidence, tried, convicted and sentenced him to a 14-year jail term.<sup>124</sup>

Given this weakened state of the Judiciary by corruption, sanctity of contracts and its enforcement has been compromised which has had collateral effect on the integrity and legitimacy of IRAs. Where contracts validly entered into and commitments freely made into are unenforceable because of a weak judicial system, it undermines commitments made by IRAs and their credibility.

#### 3.6.3.4 *Independence*

The judiciary in a democracy has the ultimate responsibility for decisions involving freedoms, rights, and obligations of persons. To do this, judges are required to be independent. This independence safeguards a party's right to have their case decided solely on the law, the evidence, and facts before the court devoid of any externalities or improper influence. A well-functioning, efficient, and independent judiciary is an essential requirement for a fair and just administration of justice. Consequently, judicial independence is an indispensable component of the Rule of Law and democracy.

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<sup>123</sup>E.S. & C.S. Ltd. v. NMB Ltd. (2005) 7 NWLR (Pt. 924) 215 at 265; IFC v. DSNL Offshore Ltd (2008) 7 NWLR (Pt. 1087) 592; Adefemi v. Abegunde (2004) 15 NWLR (Pt. 895) 1; Ogwuche v. Mba (1994) 4 NWLR (Pt. 336) 75; AG Federation v. Ajayi. (2000)12 NWLR (Pt.682) 509 at 532; Bi Zee Bee Hotels Limited v. Allied Bank (Nig.) Limited (1996) 8 NWLR (Pt. 465) 176 at 185; F.M.B.N. v.NDIC (1999) 2 NWLR (Pt. 559).

<sup>124</sup> Falana, F., *The Rot in The Judiciary*, May 27, 2013, Premium Times; A former President of the Nigerian Bar Association (NBA) Joseph Daudu in a paper titled "The independence of the Nigerian judiciary in the light of emerging political and security challenges" at Nigerian Bar Association Bar Event, Maiduguri Chapter stated that judicial corruption is openly being taken advantage of by litigants looking to buy favourable judgements and rulings.

Independence has two forms: *de jure and de facto*. It means essentially that the judges deciding matters must be independent of and not under the direction or guidance of any external body or authority; and secondly, that they must not undertake the function under the likely influence of personal gain or partisanship. Thirdly, that the matter is decided on its merits taking into cognisance the general principles of law applicable. Linking all these together is the necessity that the judiciary must not just be independent but must be seen by others to be independent.<sup>125</sup>

Encapsulated in the concept of judicial independence are certain universally acknowledged minimum prerequisites that insulate judicial officers: mode of appointment, security of tenure, discipline, conditions of service, immunity, retirement benefits, and pension packages.<sup>126</sup>

Even though the 1999 Constitution provides for the independence of the judiciary, the reality has rendered nugatory the essence of the independence. The Government has developed a culture of disobeying court decisions or choosing which of the orders to obey. Recently the National Judicial Council resolved to recall the suspended President of the Court of Appeal, Justice Isa Ayo Salami, but the Executive refused, hiding behind untenable excuses.<sup>127</sup> Under President Obasanjo, court decisions were the subject of subjective “Executive interpretations,” and the government became notorious for choosing which court decision to be bound by. Some of those included the voiding of the purported impeachment of former Oyo State Governor Rashidi

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<sup>125</sup> Jones W.H., , *The Rule of Law and the Welfare State* in *Anneles de lafaculte de Droit d’ Istanbul* 1959 IX, p. 245, quoted with approval in A. Aguda, *The Judicial Process and the Third Republic* (Lagos: F & A Publishers Limited, 1992) 35-36 and A. G. Karibi-Whyte, *The Relevance of the Judiciary in the Polity-In Historical Perspective* (Lagos: Nigerian Institute of Advanced Legal Studies, 1987) 94.

<sup>126</sup> UN Principles Basic Principles on the Independence of the Judiciary (1985); Commonwealth (Latimer House) Principles on the Three Branches of Government (2003); Universal Declaration of Human Rights (1948) (UDHR), The International Covenant on Civil and Political Rights (1976) (ICCPR) and the African Charter on Human and People’s Rights (1981).

<sup>127</sup>Falana, note 124.



Ladoja and the Supreme Court decision in the seizure of Lagos State's council funds by the Presidency.<sup>128</sup>

### 3.6.3.5 *Funding of the Judiciary*

One of the several ways to measure the independence of the Judiciary is the nature of its funding streams.<sup>129</sup> Where the judiciary draws its funding from a first line charge without having to seek approvals from another arm of government, it is deemed more independent. However, where appropriations are subject to the control and approval of another arm of government, the tendency will be to adopt a *quid pro quo* approach in approving and releasing funds.

It would appear that the intention of the framers of the 1999 Constitution was for the sanctity of the Separation of Powers doctrine when they inserted independent funding streams in the Constitution. There are copious provisions specifying the appropriation and release of funds meant for the judicial arm, and ring fencing its control of the other arms of government.<sup>130</sup>

Notwithstanding the constitutional provisions on funding, the Executive has been reluctant to recognise, respect, and implement the provisions. Since the restoration of democratic rule in May 1999, the provisions have been observed more in the breach by both the federal and state governments. In addition, the budgetary allocations to the Judiciary has recorded a steady decline with each passing year from N95 billion in 2010 to N85 billion in 2011, further to N75 billion in 2012 and only N65 billion in 2013.<sup>131</sup> In the circumstances, heads of the various courts go cap in hand entreating the Executive arm of government to release funds appropriated for the Judiciary. Naturally, since he who pays the piper dictates the tune, it is then unsurprising that the Judiciary has found it difficult to play its critical role in a functioning democracy.

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<sup>128</sup>Onanuga, A., et al, *How to ensure judicial independence*, The Nation Newspaper, Nigeria, September 18, 2012.

<sup>129</sup> Other indices of measuring independence of the judiciary include the nature of the appointment and discipline, remuneration, tenure of judicial officers.

<sup>130</sup> Section 7, 81 (2) and Section 84 (1), (2), (3), (4), and 121 of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>131</sup> Agbamuche-Mbu, M., *Judicial Funding – Time to Act*, 25 March 2014, ThisDay Newspaper, Nigeria.

Disturbed by the foregoing, a former President of the Nigerian Bar Association, Olisa Agbakoba recently approached the Federal High Court for a judicial interpretation of the relevant provisions of the Constitution on financial independence for the Judiciary. In a reasoned judgment, Justice Mohammed declared illegal, unconstitutional and invalid, the control and disbursement of funds earmarked for the Judiciary by the Executive, holding it to be in violation of Sections 81(2)(3)(c) and 84(2)(7) of the Constitution. In consequence, the court ordered that money belonging to the Judiciary in the Consolidated Revenue Fund be paid fully and directly to the National Judicial Council.<sup>132</sup> Given the apparent impunity with which the Executive views court orders, it is yet to be seen if this order will be obeyed paving the way for the financial independence of the judicial arm of government.

#### **3.6.4 The Electoral Body**

Even though different variants of the theory and concept of democracy abound,<sup>133</sup> the Nigerian variant, which mirrors the liberal democracy that has taken root in the West, emphasises four of its attributes. These include firstly, free and fair elections based on one person, one vote; and entrenched fundamental human rights through which citizens can participate in the political system. In addition, there must be adherence to the principles of Rule of Law, and an independent electoral body that is free from the influence of governmental officials and which is viewed as credible by competing parties.<sup>134</sup> The above underlines the importance of a credible electoral process, without which legitimacy questions will haunt whatever leadership emerges.

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<sup>132</sup> Daily Independent Newspaper Editorial, Nigeria, Thursday, November 27, 2014.

<sup>133</sup>Massoud, O., *Local elites, democracy and community empowerment in Nigeria*. In: A. Adedeji and B. Ayo (Eds.) *People-Centered Democracy in Nigeria?: The Search for Alternative System of Governance at the Grassroots*, 2000, Ibadan: Heinemann Educational Books at 70; Ntalaja, G.N., *Democracy and Development in Africa*: 2003, Abuja: African Centre for Democratic Governance; Janda, K. Berry J. and Goldman, J., *The Challenge of Democracy*, 1997, New York: Houghton Mifflin Company.

<sup>134</sup>Omodia, S. M., *Elections and Democratic Survival in the Fourth Republic of Nigeria*, *The Journal of Pan African Studies*, Vol.3, No.3, September 2009 at 38.

Secondly, elections help define the freedom that is inherent in a democratic process wherein the people choose who will represent them. Thirdly, they seek to underline and restate the democratic ideal: the independence of the electoral umpire from the Judicial, Legislative and Executive arms of government.<sup>135</sup>

As the body that is by law required to be impartial and independent<sup>136</sup> of all parties in the electoral chain, the legal framework setting up the electoral umpire, the Independent Electoral Commission of Nigeria (INEC) is weak. The appointment of the Chairman and Commissioners of INEC is the prerogative of the President<sup>137</sup> (unlike other more transparent and impartial processes),<sup>138</sup> subject to the confirmation of the Senate. On face value, this makes the appointees beholden to the dictates of the appointing authority! The Executive has effectively used this to populate the Commission with persons amenable to their influence and control.

INEC funding is limited to budgetary limitations of “estimates” determined by the Executive.<sup>139</sup> In addition, there is presently no parliamentary oversight of INEC. By ordinary rules of interpretation, its reporting channel is to the appointing authority, the President, thus further emasculating it.<sup>140</sup> Events in the democratic experiment so far show that the electoral body has not been able to rise above this perception.

One other element that has undermined the role of INEC as an impartial arbiter is the “incumbency factor” in the Nigerian political system. There are no clear stipulations on the utilisation of state apparatus by an incumbent to prosecute electioneering campaigns. This has led to incumbents having clear disadvantage of

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<sup>135</sup>Ibid.

<sup>136</sup> Section 158 of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>137</sup> Section 154 of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>138</sup> In South Africa for instance, a committee composed of the President of the Constitutional Court, and other senior figures from independent oversight agencies interview the candidates before sending a short list to the President for nomination.

<sup>139</sup> Section 81 of the 1999 Constitution of the Federal Republic of Nigeria and Section 5 of the Electoral Act, 2010.

<sup>140</sup> Report to the Independent National Electoral Commission (INEC) of the Federal Republic of Nigeria, Nigeria Electoral Review, Commonwealth Secretariat, IFES and the United Nations at 4.

other contestants who do not have the same access to state funds and resources.<sup>141</sup> The Executive arm has capitalised on the above weaknesses by influencing the preparations and conduct of elections thus leading to serious legitimacy questions on the outcome of each of the elections since 1999.

The perception has always been that INEC, by acts of commission or omission, works to favour the party in power.<sup>142</sup> Some of the incidents include poor planning and handing over the security of electoral materials to security agencies controlled by the government (party) in power. Others include excluding electorates in places perceived to be strongholds of the opposition by either the inadequate, non- supply or late supply of voting materials and the absence or late arrival of polling officials at those polling stations.<sup>143</sup> The poor performance has led to judicial annulments of elections because of electoral fraud in several states<sup>144</sup> and when re-runs are held, the party in power loses. Yagbyaju indicates clear cases of ballot box snatching/confiscation, falsification of results and several other types of electoral malpractices confirmed in Edo and Ondo States.<sup>145</sup>

### **3.6.5 Conclusion on Political Institutions**

The 1999 return to democratic rule had a euphoric air to it. There were high expectations that the new democratic system and its institutions would witness a new lease of life and usher in a fresh start: a break from the past military regimes, typified by “intimidation, personalization, egoism, debauchery, sycophancy, and poverty.”<sup>146</sup> Sadly, this has not been the case.<sup>147</sup> Signs of “authoritarian reversals<sup>148</sup>” abound in the Nigerian landscape. With the military ruling for almost 30 years of Nigeria’s

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<sup>141</sup> Ibid, at 11.

<sup>142</sup> Omodia, note 134.

<sup>143</sup> Abdullahi, Y.S., *Planning free and fair elections in Nigeria* in: S.M. Omodia (Ed.) *Managing Elections in Nigeria*, 2008, Keffi: Onaivi Printing and Publishing at 184 - 186 Company.

<sup>144</sup> Court- ordered Re-runs in Kogi, Adamawa, Osun and Ekiti states.

<sup>145</sup> Yagboyaju, note 93 at 95.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Jega, A. M., *Democracy, Good Governance and Development in Nigeria: Critical Essays*, 2007, Ibadan, Spectrum Books, Ltd.

independence<sup>149</sup>, a democratic culture is alien to Nigerians. The culture has been militarised, characterised by displays of authoritarian tendencies among the civilian ruling class as evidenced by intolerance, “insensitivity to and lack of accommodation of, differing perspectives and orientations, intolerance to dialogue as a means of avoiding or resolving conflict.”<sup>150</sup> The latest attempt at democratic governance has witnessed crass impunity, leadership by exclusion<sup>151</sup> all pointing to a “military hangover”<sup>152</sup> has been the norm rather than the exception since the advent of civilian rule.

From the foregoing, it is clear that critical political institutions central to the functioning of the state - the Executive, Legislature, Judiciary, and the electoral body, exist but function at a sub-optimal level, insufficient to support the IRA model of governance. IRAs derive their powers through delegation from the Legislature and the Executive and where these arms are weak and at loggerheads with each other, it impugns on the performance and effectiveness of the IRA. An African proverb says, “When two elephants fight, it is the ground that suffers.”

### **3.7 Supporting Institutions**

Aside from the political institutions, this research will consider another category of institutions that support political institutions. Their existence gives legitimacy to political institutions through a process of prodding and checking towards a path of legality, transparency, and good governance. For this category of institutions to be effective, they must operate at a level of independence that would allow them to discharge their mandate without fear. These are also relevant to the functioning of

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<sup>149</sup>Agbese, P. O., *The Politics of Stable Civil-Military Relations*, 2005, London, Zeds Books, London.

<sup>150</sup>Jega, note 148.

<sup>151</sup> Even though the term “rent seeking” is often used interchangeably with “corruption,” there is some difference. While corruption involves the misuse of public power for private gain, rent seeking derives from the economic concept of “rent” -- earnings in excess of all relevant costs (including a market rate of return on invested assets). It essentially refers to the acquisition of benefits from natural endowments such as minerals without beneficiation or value added. It is a concept prevalent in many resource rich undeveloped nations such as Nigeria.

<sup>152</sup> Ibrahim, A., *Post Military Era and the Challenges of Democratic Governance in Nigeria*, ACESER, Africa-Dynamics of Social Science Research Volume 4 Number 1, June 1, 2013.

IRAs because firstly, they can serve as pressure points to ensure the independence of IRAs; and secondly they interact with and influence IRAs in everyday interactions within the body polity.

This category includes the Public Service, Political Parties, Civil Society Organisations (CSOs), and the Media.

### **3.7.1 Public Service**

According to Kofi Annan, “Good governance is perhaps the single most important factor in eradicating poverty and promoting development”<sup>153</sup> as it is central to the advancement of sustainable development. The public service is the agent through which good governance is attained. If achieved, it “promotes accountability, transparency, efficiency and rule of law (and) allows for sound and efficient management of human resources for equitable and sustainable development.”<sup>154</sup>

The public service is responsible for implementing the laws and policies of government, a necessary element, as no law or policy is self-implementing or self-executing. They all rely on human instrumentality through administrative mechanisms led by skilled bureaucrats working within the public service to bring them into reality.

Nigeria’s long years of military rule affected the psyche of governance institutions in a fundamental way, including the public service. With the coming to power of each military regime, public servants were the continuity agents, bridging the old and the new, in the face of the inexperience of the military rulers.<sup>155</sup> This close relationship became a double-edged sword: it served to cement public servants’ role as indispensable implementing agents of government policies and programmes, but it also exposed them to the allure of power, leading to abuse of office, and making them part of the military maladministration .

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<sup>153</sup> Annan, K., Annual report to the General Assembly on the work of the organization, 1998 in Adeosun, A.B., Adeosun, A., NIGERIA@50: The Role of Good Governance and Effective Public Administration Towards Achieving Economic Growth and Stability In Fledgling Democracy, International Journal of Politics and Good Governance Volume 3, No. 3.3 Quarter III 2012 at 4.

<sup>154</sup>Ibid, at 4.

<sup>155</sup>Ayodele, B., and Bolaji, K., *Public Service and Democracy in Developing Societies: The Nigerian Experience*, J. Soc. Sci., 15(2): 105-110, 2007 at 107.

With the ushering in of democratic rule, the expectation was that the public service would align itself with the democratic ideal of implementing policies aimed at affecting positively the socio-economic well-being of the citizenry.<sup>156</sup> Sadly, the provisional verdict has been a mixed bag of more bad than good apples. It has by its conduct tilted more to maintaining the status quo of crass corruption, nepotism, kick - backs, the inflating of the wage bill and staff numbers, and the falsification of accounts, permeating all the ladders of the public service.<sup>157</sup> In the words of Ayodele, et al “rather than abate, bureaucratic corruption has become elevated to the level of preventing the people from benefiting from the dividends of democracy.... All of these contributed tremendously to the failure of the public service contributing to democracy”<sup>158</sup>

Given that the public service is the engine room for the realisation of government policies and programmes,<sup>159</sup> its inherent institutional fragility has had a major impact on service delivery. This marks one addition to the litany of weaknesses that cloud the institutional landscape of the nation.

### **3.7.2 Political Parties**

Political parties, according to the National Democratic Institute are bodies that allow for galvanising forces into a political bloc to seek a mandate to govern. As has been noted, there can be political parties without democracy; but there can be no democracy without political parties.<sup>160</sup>

Democracy ensures that citizens participate in governance by freely choosing who would best represent them. This in turn opens up the space for popular

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<sup>156</sup>Ibid.

<sup>157</sup>Ibid at 107.

<sup>158</sup>Ibid at 109.

<sup>159</sup>Ipinlaye, O., *The Nigerian Civil Service: An Insider's View*, in F. Omotoso (ed.), *Contemporary Issues in Public Administration*. 2001, Lagos: Bolabay.

<sup>160</sup> Statement contained on its desktop webpage under heading “Political Parties” accessed on 8/26/14 at 1.09am. The National Democratic Institute is a non-profit, nonpartisan organization working to support and strengthen democratic institutions worldwide through citizen participation, openness and accountability in government based in Washington, DC.

participation, accountability, and delivery of policies and programmes through good governance that would meaningfully improve people's lives.

There are two fundamental purposes<sup>161</sup> of political parties in a democracy: first, political parties define and express a group's needs in a manner that the public can understand and respond to. Second, they develop common ideas among a significant group in order to apply pressure to the political system to attain set goals and objectives by moderating and channelling diverse opinions and dissent into common positions towards a common good. Thus, political parties are essential to the existence and thriving of the democratic process.<sup>162</sup>

Beyond this theoretical postulation and on a functional level however, political parties nominate candidates; articulate policy preferences; sell the policies through campaigns to the public and act as breeding grounds for political leaders who will eventually assume leadership roles.<sup>163</sup> They ought to be populated by like-minded persons who espouse a common ideology, and promote an agreed set of programmes encapsulated in a manifesto that is geared towards meeting the needs of the public it seeks to govern.<sup>164</sup>

These ideals are manifestly lacking in the Nigerian political system. Several factors account for the weak state of political parties in Nigeria. Firstly, the domineering role of powerful individuals, known as godfathers and cabals, who reserve the power to decide for the people, and manipulate the emergence of candidates of their choosing,

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<sup>161</sup> Wollack, K., *Political Parties in Developing and Developed Countries*, Remarks at the Carnegie Endowment for International Peace & China Reform Forum Beijing, December 17, 2002, Beijing, December 17, 2002 at 7.

<sup>162</sup> Lamidi, K.O., and Bello, M.L., *Party Politics and Future of Nigerian Democracy: An Examination of Fourth Republic*, European Scientific Journal December edition vol.8, No.29; Egbewole, W.O., and Muhtar, M.A., *The Role of opposition in Nigerian politics*, African Journal of Political Science and International Relations. Vol. 4.No. 6. 2010; Huntington, S.P. *Political Order in Changing Society*, New Haven: Yale University Press, 1968.

<sup>163</sup> Wollack, note 161 at 7.

<sup>164</sup> Adejumo, S. and Kehinde, M., *Building Democracy without Democrats? Political Parties and Threats of Democratic Reversal in Nigeria*, Journal of African Elections, 2007 in Lamidi and Bello, note 162.



largely with the assistance of state institutions, such as the Police, EFCC, the Army, and INEC.<sup>165</sup>

Secondly, the lack of internal party democracy in the nomination of candidates, which tends to be chaotic, corrupt and result in the imposition of candidates in the guise of party supremacy against the will of the electorate.

Thirdly, because of a lack of institutionalised rules, processes and procedures, decision-making in political parties has become centralised thus shutting out the overwhelming grassroots majority.<sup>166</sup>

Fourthly, there is clear absence of ideological underpinnings in the political parties that unifies members. Faint attempts since the return to democratic rule to assign ideological tags to the different political parties has not succeeded.<sup>167</sup> It would appear that the only appearance of an ideology, which all the parties share, is the desire to capture power. Violence, acrimony, and open warfare with personal interests are the hallmarks of electioneering processes and campaigns.<sup>168</sup>

Fifthly, the clear unwillingness or inability of political parties and their leadership to undertake greater citizen outreach and secure concerted public's support for their programmes has led to a lack of grassroots popular support thus reducing them to elitist organisations.<sup>169</sup>

The nascent nature of this vital institution that regulates the manner candidates emerge to become leaders has affected the quality of the political process and the calibre of Nigerian leaders. This weakness points to the institutional fragility that has an overall effect of sustainable economic development and the success of the IRA mantra.

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<sup>165</sup>Ibid; Omotola, J.S., *Godfathers and the 2007 Nigerian General Election 2007*, Journal of African Elections, 16(2).

<sup>166</sup>Adejumobi and Kehinde, note 164.

<sup>167</sup> Ibid.

<sup>168</sup> Alumona, I.M., *The Politics of Democratization In Nigeria: Are the People Involved?* Journal of Sustainable Development in Africa Volume 12, No.7, 2010, Clarion University of Pennsylvania, Clarion, Pennsylvania.

<sup>169</sup>Lamidi and Bello, note 162.

### 3.7.3 Civil Society Organisations

Diamond offers a detailed conceptualisation of civil society organisations (CSOs) as belonging to the “the realm of organized social life that is open, voluntary, bound by a legal order or set of shared rules<sup>170</sup>” and sees them as an intermediary between the private sphere and the organized state. CSOs consist of non-state actors that congregate to pursue defined issues and goals, and include non- governmental organizations, think tanks, community based organizations, faith based organizations, ethnic associations, advocacy groups, social movements, professional groups, human and civil liberties groups, environmental activist groups, labour and trade unions, and values-preservation pressure groups.<sup>171</sup>

CSOs worldwide and especially within the African context have had a vital role in shaping the political, social and economic development of their host states.<sup>172</sup> From among the political supporting institutions, CSOs stand out in their role of sensitising the public where the state seeks to overreach and muzzle IRAs in performing their functions. They play a multiplicity of change agent roles including:<sup>173</sup>

- a) improving the quality of governance and its supporting institutions;
- b) prodding governments to endorse principles of transparency, accountability and openness in the political space;
- c) serving as watchdogs to check the excesses of government;
- d) exposing and restraining violations of human rights;
- e) watching over the constitutional ethos and guarding against its abuse;

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<sup>170</sup>Diamond, L., *Development Democracy: Toward Consolidation*, Baltimore: The Johns Hopkins University Press, 1999 at 221.

<sup>171</sup>Majeed, M., *Civil Society and Democratic Consolidation in Africa: A Comparative Study of Ghana and Nigeria*, Central European University, Budapest, Hungary, 2011 at 10;  
<http://www.freeonlinepapers.com/role-civil-society-democratic-sustenance-nigeria> accessed on 9/2/2014 at 12.18am.

<sup>172</sup>Omede, A.J, and Bakare, A.R., *The Impact of Civil Society Organizations on Sustainable Development in Developing Countries: The Nigerian Experience*, International Multidisciplinary Journal, Ethiopia, Vol. 8(1), Serial No. 32, January 2014 at 203.

<sup>173</sup>Ibid at 203; Majeed, note 171.

- f) holding elected official and public servants to account in financial and budgetary matters;
- g) supporting the role of political parties and the citizenry in stimulating political participation and education, and a transparent electoral process increasing political efficacy and skills; and
- h) helping alienated groups to move to the mainstream.

In the Nigerian context, CSOs have a chequered history that dates back to colonial rule where there were sustained engagements along regional and tribal lines to press for independence. After independence however, their development became fragmented and stunted, marked by intermittency, disappearing on the accomplishment of its immediate goal, only to re-emerge where new threats arose.<sup>174</sup> In the recent past however, they have played an instrumental role in resisting the numerous military regimes that interspersed Nigeria's history until the return to civil rule in 1999.<sup>175</sup>

CSOs have been unable to replicate their role as change agents since the transition to civil rule in order ensure good governance, accountability, the nurturing of democratic institutions and the resistance to and curtailment of autocratic tendencies in the state and its officials.

An Economic Community of Africa Report attested to the variable role of CSOs, rating their influence on public policies to be less than 20%.<sup>176</sup> The reasons for this state of affairs include inadequate funding streams; lack of unity of purpose among players in the same CSOs space as the result of ego, tribal and regional, sectional or religious cleavages; and a disconnection between the CSOs and most of rural population due to urbanised nature of the CSOs. Other reasons are the lack of internal democracy within

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<sup>174</sup>Majeed, note 171 at 18; Tar, U.A., *The Politics of Neoliberal Democracy in Africa: State and Civil Society in Nigeria* (International Library of African Studies), I. B. Tauris; 1 edition, New York, (December 9, 2008) at 125.

<sup>175</sup>Omede and Bakare, note 166.

<sup>176</sup> Economic Commission for Africa, Addis Ababa, *African Governance Report, 2005* at 133

the groups; a gross lack of institutional capacity, and tendencies of corruption and personal enrichment among promoters of these groups.<sup>177</sup>

Because of their ineffectiveness, CSOs in Nigeria have been unable to stand firm and take their rightful place in the building of valuable institutions and structures to support sustainable economic development including the emergence of strong IRAs.

### 3.7.4 The Media

Since the dawn of democracy in the 17th Century, the role of the media as the Fourth Estate and an avenue for public discussion and debate has been recognised.<sup>178</sup> In addition, it is viewed as a “watchdog, guardians of the public interest, and as a conduit between governors and the governed ....”<sup>179</sup> This role is recognised more in fledgling democracies, where the media can assist with the deepening of democracy.<sup>180</sup> This role, justified by the Social Responsibility Theory,<sup>181</sup> requires the press to inform and respond to the public’s needs for information by an objective presentation and dissemination of information with a view to promoting good governance and democratic values.<sup>182</sup>

Within the context of Nigeria where there is an emerging democracy with weak supporting institutions, the role of the media becomes more pronounced. Coronel makes the point that:

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<sup>177</sup> Omede and Bakare, note 172; Majeed, note 171.

<sup>178</sup> Coronel, S.S., The Role of the Media in Deepening Democracy, <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan010194.pdf> at 3

<sup>179</sup> Ibid at 1.

<sup>180</sup> Ibid.

<sup>181</sup> Social Responsibility Theory tasks media professionals’ mettle to evolve innovative ways of being relevant to their communities in the discharge of their professional duties. It calls upon the media to view themselves as “front-line participants in the battle to preserve democracy in a world drifting inexorably towards totalitarianism.” This expectation is underlined by the power and monopoly unique position of the media in ensuring that all sides are presented to the public to decide. See Siebert, F., Schramm, W. and Peterson T. (1956) *Four Theories of the Press*. Urbana, Illinois: University of Illinois Press; Baran S.J. Davis D.K, (2000). *Mass Communication Theory: Foundations, Ferment, and Future*. 2nd Edition, Belmont CA: Wadworth.

<sup>182</sup> Ibid.

a fearless and effective watchdog is critical in fledgling democracies where institutions are weak and pummelled by political pressure. When legislatures, judiciaries and other oversight bodies are powerless against the mighty or are themselves corruptible, the media are often left as the only check against the abuse of power. This requires that they play a heroic role, exposing the excesses of presidents, prime ministers, legislators and magistrates despite the risks.<sup>183</sup>

The media is often seen as the only institution left to provide checks against the abuse of power and expose corruption with a view to entrenching transparency, accountability and strengthening fledgling institutions.<sup>184</sup> Even within the framework of the 1999 Constitution, Sections 22 and 39 unequivocally stipulate their role to be that of upholding responsibility and accountability of the Government to the people of Nigeria. To allow for the effective discharge of its mandate, the Constitution further secures to every person the freedom of expression, including freedom to hold opinions, receive and impart ideas and information without interference. In performing its assigned roles however, the media has met challenges that have militated against the due discharge of its mandate. Some of these challenges are self-inflicted while some come from external sources seeking to control, subjugate, and dilute the impact of the media on the governance front.

Externally, the media have come under major restraining challenges from the government. Successive military regimes enacted anti – media decrees<sup>185</sup> in a bid to

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<sup>183</sup> Coronel, note 178.

<sup>184</sup> Ibid.

<sup>185</sup> Circulation of Newspaper Decree No 2, 1966; The Defamatory and Offensive Publications Decree No. 44, 1966; Newspaper Prohibition of Circulation Decree No 17 1967 and the Public Officers (Protection against false accusation) Decree No 11 1976. Others are the Newspaper (Prohibition of circulation) (Transfer of Certain Shares) Decree No 101, 1979; Public Officers (Protection Against False Accusation) Decree No 4 1984; Decree No. 35 of 1993, the Offensive Publications (Proscription) Decree; Decree No. 48 of 1993; Constitution (Suspension and Modification) Decree No, 1 1984; State Security (Detention of Persons) Decree 2; Federal Military Government (Supremacy and Enforcement of Powers Decree No 13, 1984; and Newspaper (Prohibition of Circulation) (Transfer of Certain Shares) Decree No 101, 1979.

muzzle the press, and this development saw reporters thrown into detention<sup>186</sup> and prison<sup>187</sup>, while journalists were murdered in cold blood in the course of discharging their duties.<sup>188</sup> This anomaly continues under democratic rule.<sup>189</sup>

The self-inflicted wound undermining a vibrant and responsive media is corruption. There have been numerous situations where media people seek favours and bribes to cover events or disseminate news or to write and disseminate materials against opponents of the payees. Although corruption in the media worldwide is multi-faceted, in Nigeria the most popular corrupt practice is the acceptance of what is popularly called “brown envelop”<sup>190</sup>, which has been rampant and a widely known occurrence.<sup>191</sup>

Considering the important role the media plays in other democracies in shaping and advancing democratic ideals, the weaknesses that trail the media in Nigeria has undermined its ability to discharge the mandate society thrusts upon them as the watchdog, thereby betraying itself as a fragile institution in the governance architecture of Nigeria.

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<sup>186</sup> On September 10, 1997, Arit Igiebor wife of the Tell Editor-in-chief was arrested and detained. On November 10, 1997, Nduka Obaigbena Editor-in-chief of ThisDay was detained by security operatives.

<sup>187</sup> Chris Anyanwu, publisher of TSM, Kunle Ajibade, editor the News, George Mba Senior Editor Tell, Charles Obi, Editor of defunct Classique all were jailed 15 years for making unbiased reports on the 1995 video coup saga. Niran Malaolu, editor of the Diet was also jailed for life for similar offences.

<sup>188</sup> In October 17, 1989 Dele Giwa was invited by the State Security Service and accused of gun running. Two days after, Dele Giwa was killed by parcel bomb; Bahuada Kaltho, the Kano State correspondent of the News was branded a terrorist and murdered in mysterious circumstances.

<sup>189</sup> Idumange, J., *Imperatives of the Mass Media in the Sustenance of Democracy in Nigeria from 1999-2003*, De-Saint-online news Blog, <http://mienpamo.wordpress.com/about/> accessed on 3/9/14 at 11.55am.

<sup>190</sup> The brown envelope is a form of financial gratification and is viewed as a form of bribe paid by news sources to journalists to enable the former to get favourable news coverage. The practice is not alien to other parts of the world though practice differs from place to place. In addition to brown envelope it has other names including “matter”, “load”, “eego”, “chopay or choppe”, “colanut”. This same term is also used in some African and Asian countries. The broad term that perfectly covers the practice is “envelope journalism.” Adeyemi, A., *Nigerian Media and Corrupt Practices: The Need for Paradigm Shift*, European Scientific Journal January 2013 edition vol.9, No.1 at 124; Obianigwe. N. O. (2009) *Perception of Lagos – Based Journalists On Brown Envelope Syndrome In The Coverage Of News Events In Nigeria*, unpublished B.Sc Project. Covenant University.Ota. Nigeria.

<sup>191</sup> Adeyemi, note 190 at 124.

Beyond the role and contributions of political and supporting institutions to the present state of Nigeria's under-development, the nation's political leadership has played a more important role that deserves dissection.

### **3.8 Political Leadership: Theoretical Framework**

Leadership has been defined as "the art of motivating a group of people to act towards achieving a common goal,"<sup>192</sup> and the "process of getting things done through people."<sup>193</sup> It is also the process of persuasion or example, by which an individual induces a group to pursue objectives held by the leader or shared by the leader and the followers.<sup>194</sup>

Leadership is both a science and an art. Thus, although one may be born with natural leadership attributes and traits, there is a place for training, sharpening and deepening of those qualities for them to be relevant to the challenges of the environment.<sup>195</sup> Shilgba argues that good leadership does not arise through luck and those who assume power through that route attract scepticism until they prove themselves adept at justifying the confidence luck reposed in them.<sup>196</sup> The reference to luck within the leadership equation is important here as some leaders in Nigeria assumed power through good luck and that was deemed sufficient for them to govern with very costly consequences.

Political leadership as a variant of leadership refers to a ruling group that bears the responsibility of managing the affairs and resources of a political entity by setting and influencing policy priorities through decision-making structures and institutions created for its orderly development. This definition encompasses all the people who

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<sup>192</sup> Ward, S., *Leadership*. About.com, Small Business: 2009, Canada Retrieved from <http://sbinfoCanada.about.com/od/leadership/g/leadership.htm>.

<sup>193</sup> Northouse, G., *Leadership theory and practice*, 2007, (3rd ed.). Thousand Oak, CA: Sage.

<sup>194</sup> Gardener, J., Weekly Trust, September 16, 2004 in Ogbeyidi, M.M., Political Leadership and Corruption in Nigeria Since 1960: A Socio-economic Analysis, *Journal of Nigeria Studies*, Volume 1, Number 2, Fall 2012.

<sup>195</sup> Mkapa, note at 45.

<sup>196</sup> Shilgba, L.K., On Goodluck Jonathan: Luck is Not Enough, Sahara Reporters, [www.saharareporters.com](http://www.saharareporters.com) Feb 20, 2010.

hold decision-making positions in government, and people who aspire to those positions, whether by means of election, appointment, *coup d'état*, a right of inheritance or otherwise.<sup>197</sup>

Within the context of this research, however, political leadership refers to the titular head that represents, appropriates, or aggregates the mechanisms of power, one in whom the ultimate power of decision-making rests. This distinction between an identifiable individual as against a class or group of people is very important in our present endeavour. This research seeks to show that a class as an entity has rarely wielded power in Nigeria as all the leaders have been strong wielders of power with little or no deference to others within or without the political class.

Political leadership is central to growth in all aspects of a nation's socio-economic development. Growth occurs when a nation's leadership is able to facilitate, entrench, and sustain good governance. Good governance on the other hand emerges from a committed and disciplined leadership. Even though this research acknowledges the importance to institutions for growth, political leadership ensures the emergence of the institutions.<sup>198</sup> This is done through good governance. Effective political leadership is therefore an imperative for sustainable development. The task of articulating a policy direction and implementing policies and programmes that lead to sustainable development has never fallen on the masses in any society but on an identifiable leadership head.<sup>199</sup> There is therefore a strong relationship between leadership, vision, and sustainable development.

### **3.8.1 Political Leadership in the Nigerian Context**

In considering the role and importance of institutions to economic growth and development and by extension the viability of IRAs, extant literature assumes the existence of a governance structure that would nurture such institutions. As valid as the

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<sup>197</sup> Ogbeidi, note 194.

<sup>198</sup> Ibid.

<sup>199</sup> Moghalu, C.K., *Emerging Africa, How the Global Economy of the 'Last Frontier' can prosper and matter*, Penguin Books, London, 2014 at 16-17.



above assumption is, it does not take into consideration the cultural peculiarities of Nigeria.<sup>200</sup>

There is an overall agreement among writers and commentators<sup>201</sup> that the problem of Nigeria is one of leadership. This has in turn dovetailed into and affected the smooth establishment and operation of IRAs. The renowned novelist Chinua Achebe, in his book *The trouble with Nigeria*, argued that the problem of Nigeria

is simply and squarely a failure of leadership. There is nothing basically wrong with the Nigerian character. There is nothing wrong with the Nigerian land, climate, water, air, or anything else. The Nigerian problem is the unwillingness or inability of its leaders to rise to their responsibility, to the challenge of personal example, which is the hallmark of true leadership.<sup>202</sup>

Nigeria's governance architecture since Independence has seen the emergence of leaders that have governed and exhibited similar leadership traits and nuances. Ironically, even though Nigeria has been governed by a military and civilian class, with one relying on the will of people to govern while the other foisting itself upon the governed by force, the outcomes have been the same. These outcomes are grouped into five themes: accidental and ill prepared; corruption; a lack of respect for the Rule of Law; mismanagement of the economy; and a subjugation of institutions to political control. The thesis will now discuss these themes drawing out the linkages between them and governance and by extension the negative impact they have on the IRA model.

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<sup>200</sup> Ijewereme O.B., and Dunmade E.O., *Leadership Crisis and Corruption in Nigerian Public Sector: Implications for Socio-Economic Development of Nigeria*, International Journal of Public Administration and Management Research (IJPAMR), Vol. 2, No 3; Ogbeidi note 194 at 1-25.

<sup>201</sup> Achebe, C., *The Trouble with Nigeria*, 1984, Oxford: Heinemann Educational Publishers; Imhonopi, D and Ugochukwu, M. U, 2013, *Leadership Crisis and Corruption in the Nigeria Public Sector: An Albatross of National Development*, in *The African Symposium: An Online Journal of the African Educational Research Network*, Vol.3, No.1; Dike, V.E., *Review of the Challenges facing the Nigerian Economy: is National Development Possible Without Technological Capability?* Journal of Sustainable Development in Africa (Volume 12, No.5, 2010); Ijewereme and Dunmade, note 200.

<sup>202</sup> Achebe, note 201.

### 3.8.1.1 *Accidental and ill preparedness*

As if on cue, all the political heads that have emerged since Independence were unprepared for leadership and lacked the essential governance tools necessary for effective governing such as knowledge, vision, imagination, transparency, motivation, and patriotism. Preparation here contemplates a mental anticipation of the office; the development of a coherent plan and programme of action for implementation; and the possession of a vision that can galvanise and energise the nation towards one common goal of sustainable development.

Under military leaderships, this lack of preparation was clearly demonstrated when the nature of military takeovers is dissected. Normally coup planning, being an act that is treasonable under all of Nigeria's past and present Constitutions, is a secretive venture.<sup>203</sup> Meetings usually held clandestinely in a hurried and hushed manner, within circles of army officers who trust themselves and maintain personal loyalties. It had nothing to do with qualifications or competencies for leadership but with one's ability to keep secrets. There is therefore no room for a robust discourse of ideas in preparation for leadership in coup planning within the Nigerian context.<sup>204</sup>

Secondly, the selection of who to lead the military junta usually had nothing to do with a strategic process that takes into consideration a person's competencies and readiness for office, but rather has more to do with personal loyalties and interests.<sup>205</sup> This robs the nation of the services of the best brains on offer in the military.

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<sup>203</sup> Section 1 (2) states that "The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution."

<sup>204</sup> Nigeria's first two military rulers, Generals Ironsi and Gowon both emerged under similar clandestine circumstances: Fabiyi, O., *52 Years of Gambling*, Nigeria Intel, Thursday, October 09, 2014, [www.nigeriaintel.com](http://www.nigeriaintel.com); Arthur Nwankwo (1989) in Ebegbulem, J.C., *Corruption and Leadership Crisis in Africa: Nigeria in Focus*, International Journal of Business and Social Science Vol. 3 No. 11; June 2012, 221. Gowon himself in a recent interview confessed that he had been out of the country when the decision was taken to remove Ironsi and make him the head of state and he had only 46 hours to take a decision on whether to accept or not. The same was the pattern in all the other military regimes in Nigeria.

<sup>205</sup> Fabiyi, O., note 204; Arthur Nwankwo, note 204.

Under civilian regimes, the same situation replicated itself but a different culprit was to blame for the accidental emergence of Nigeria's political leadership. Civilian democratic rule is founded on democratic ethos, which envisages a "government of the people, by the people, for the people" universally.<sup>206</sup> In Nigeria, however, the system has unwittingly undergone some whitewash with a version more akin to a government of the people, by the godfathers, for the people. Godfathers have since Independence determined who emerges as the political head of the country.

The dominance of "godfatherism"<sup>207</sup> within Nigeria's political space has overshadowed the concept of participation and representation that is central to democracy.<sup>208</sup> Omotola<sup>209</sup> has posited that the rise of "godfatherism" is a result of the weak state of democratic institutions that have been unable to check its emergence. This has facilitated the monetisation and bastardisation of the nation's political space, resulting in the subversion of core democratic institutions. This in turn has reduced the people who ought to be deciding their own fate politically through the ballot box to mere clients/consumers or spectators in the democratisation arena. The consequences have mostly been bad governance and rising conflict across the country.<sup>210</sup>

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<sup>206</sup> Quote attributed to the U.S. President Abraham Lincoln, in a speech that was delivered during the American Civil War, on the afternoon of Thursday, November 19, 1863, at the dedication of the Soldiers National Cemetery in Gettysburg, Pennsylvania.

<sup>207</sup> Democracy entails participation by citizens in the electoral process and representation by an elected group based upon a mandate from the former. In Nigeria however, the two concepts have fused into one since independence. The pattern has been that elites first create political platforms to ventilate their preferences and then in satisfaction of the requirement of participation, invite the masses to join. Thus, political systems have never been grassroots-based, but rather driven by personal interests. These elites, who have the benefit of knowledge of the political terrain and the financial wherewithal to deploy such knowledge and resources, then the political process by determining who emerges as a candidate for elections and who eventually gets elected notwithstanding the inclinations of the voting public. These elites are the Godfathers. See Olarinmoye, O.O., *Godfathers, political parties and electoral corruption in Nigeria*, African Journal of Political Science and International Relations Vol. 2 (4), pp. 066-073, December 2008.

<sup>208</sup> Ibid.

<sup>209</sup> Omotola, note 165.

<sup>210</sup> Ibid.

Beginning with the first head of state after independence, “godfathers” have straddled Nigeria’s political landscape and determined who emerges as the nation’s leader. Balewa who emerged the Prime Minister was not positioned for that role. Rather, it was the leader of the NPC, the Sardauna of Sokoto, Ahmadu Bello who had won the majority of seats in parliament who was to emerge as the Prime Minister. The latter however, showed no interest in the position but rather propped up Balewa for the office, preferring to remain in his domain as the Sardauna of Sokoto; while continuing to pull the “strings” from behind.<sup>211</sup> Thus, the first head of state did not aspire for leadership of the country, but it was merely thrust on him. On the level of personal preparedness for office, Balewa’s background, education and training was very rudimentary and did not equip him for the high office of head of state of a newly independent nation.<sup>212</sup>

The pattern of an ill-prepared leadership was the lot of all military heads of state (for the reasons earlier given on the nature of coup planning) and all the democratic leadership right up to the present. As Nigeria’s second democratically elected President, Shagari’s ambition was to be a Senator until political horse-trading and back room deals thrust him forward to become the President. This was to be replicated in the successive democratically elected Presidents (Olusegun Obasanjo and Musa Yaradua).<sup>213</sup> The case of the immediate past President, Goodluck Jonathan further underscores this point.

Jonathan’s rise to power has indeed been attributed to good luck. As Deputy Governor in the Southern state of Bayelsa, he was recorded to be “aloof and disconnected to governance”<sup>214</sup> until the sudden impeachment of the Governor on corruption charges threw him up as the Governor. Barely two years into his tenure as Governor of the state, he emerged as a consensus candidate for the office of Vice President under backroom political dealings on the night of the ruling party’s

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<sup>211</sup>Asuzu, O.J., *The Politics of Being Nigerian*, Lulu Publishers, lulu.com, 2005.

<sup>212</sup>Nwankwo, note 204.

<sup>213</sup> Steve Bloomfield, *Obasanjo picks 'puppet' successor in elections*, The Independent (UK), 17 December 2006.

<sup>214</sup> The New York Times, *An Accidental Leader Stirs Hopes in Nigeria*, February 19, 2010

convention to select a Presidential candidate to run for office.<sup>215</sup> On winning elections as a Vice Presidential candidate for Yar'ardua, he was the Vice President for only a little over two years when the President died and he assumed the office of President. His meteoric rise has therefore been likened to good luck and chance but certainly cannot be attributed, by any stretch of argument, to preparation for the high office. Good luck, as earlier been argued by Shilgba, is not enough an ingredient for leadership and sterling performance, neither does it prepare or endue one to solve societal problems.<sup>216</sup>

### 3.8.1.2 Corruption

Steep corruption and unbridled "wild appetite for transient materialism"<sup>217</sup> have been recorded as the signature tune of almost all the governments of Nigeria since independence. Corruption has eaten deep into the fabric of Nigerian society and of every regime since independence. As the Chinese say a fish usually starts getting rotten from the head, so did corruption among the political leadership permeating the whole society. Starting from the first government at independence, there has been recorded cases of widespread corruption and looting of the public treasury with no attempts by the leadership to halt it.<sup>218</sup> This trend was the hallmark of successive regimes, as

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<sup>215</sup> Ateb, S., *Understanding the background of Nigerian president, why so much bad luck follows Goodluck Jonathan*, accessed from <http://simonateba.com/2014/03/03/understanding-background-nigerian-president-much-bad-luck-follows-goodluck-jonathan/> on 10/10/14 at 10.50pm; Alabo Tonye Graham-Douglas, Daily Independent Newspaper, Nigeria, Friday, October 10, 2014.

<sup>216</sup> Shilgba, note 196.

<sup>217</sup> Ayodele in Ebegbulem, J.C., *Corruption and Leadership Crisis in Africa: Nigeria in Focus*, International Journal of Business and Social Science Vol. 3 No. 11; June 2012, 221.

<sup>218</sup> Ogbeidi, note 194. Established cases of corruption against Dr Nnamdi Azikiwe regarding dealings in the defunct African Continental Bank; Chief Obafemi Awolowos' corrupt dealings with Western Region Marketing Board were neither looked into nor the perpetrators charged to court. See Sklar, R. L. (2004). *Nigerian Political Parties: Power in an Emergent African Nation*, 1stEd. Trenton, New Jersey: African World Press Inc; Report of the Foster-Sutton Tribunal of Inquiry. (1956). Lagos: Federal Ministry of Information; Okonkwo, R. (2007), *Corruption in Nigeria: A Historical Perspective (1947 -2002)* in African Unchained. Retrieved from <http://africaunchained.blogspot.com/2007/09/corruption-in-nigeria-historical.html>; Report of Coker Commission of Inquiry into the Affairs of Certain Statutory Corporations in Western Nigeria. (1962). Lagos: Federal Ministry of Information; Magid, A. (1976), *Men in the Middle: Leadership and Role Conflict in a Nigerian Society*. New York: Holmes & Meier.

military governments that purported to overthrow civilian governments because of corruption became themselves immersed in higher levels of corrupt practices.<sup>219</sup>

### 3.8.1.3 *Lack of Respect for the Rule of Law*

Underlining the tenures of both civilian and military regimes has been a culture of brazen impunity, crass authoritarianism, abuse of human rights, and the display of maximum powers devoid of an adherence to norms of due process and the Rule of Law. Rule of men prevailed over the Rule of Law as regime after regime sought to outdo one another along this downward path. The afterglow of military authoritarianism overshadowed democratic credentials of the emergent civilian governments.<sup>220</sup>

### 3.8.1.4 *Mismanagement of the Economy*

Short-sightedness has characterised the management of the economy of the nation since independence during both the civilian and military regimes. The many beautifully crafted development plans and goals were implemented more in the breach after the discovery of oil in commercial quantities.<sup>221</sup>

A conclusion that Nigeria planned to fail in spite of numerous national development plans because of institutional weaknesses that allowed those plans to be routinely set aside whimsically best captures the history of Nigeria's economic woes.<sup>222</sup> The oil boom that was accompanied by a surplus in national income of the 1970s rather than having been invested in national infrastructure and long term development, was

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<sup>219</sup> Ibid.

<sup>220</sup> Ogbonnaya et al, *The Challenges of Democratic Governance in Nigeria's Fourth Republic*, Mediterranean Journal of Social Sciences, Vol. 1 (11) November 2012 at 690; Bankole D., *The Role of the Legislature in the Consolidation of Democracy in Nigeria*, in *The Challenges of Democratic Governance in Nigeria's Fourth Republic*, Ogbonnaya et al, in Mediterranean Journal of Social Sciences, Vol. 1 (11) November 2012 at 690.

<sup>221</sup> Falola, T and Heaton, M.M., *A History of Nigeria*, 2008, Cambridge University Press.

<sup>222</sup> Ibi-Ajayi, S.I., *Institutions, the Missing Link in the Growth Process*, 2002, Presidential Address, Ibadan: Nigerian Economic Society; Obadan, note 42; Bertocchi, G., and Guerzoni, A., *Growth, History or Institutions? What Explains State Fragility in Sub-Saharan Africa*, 2010, IZA Discussion Paper, No. 4817; Fosu, A.K., *Democracy and Growth in Africa: Implications of Increasing Electoral Competitiveness*, 2008, Economics Letters, Vol.100: 442-444; Osabuohien note 15.

frittered away.<sup>223</sup> Although with the global financial meltdown most nations are developing cost saving measures, in the Nigerian context salaries of political office holders have continued to rise and are presently higher than their counterparts in wealthier countries and key developing nations, according to an analysis published by the Economist magazine.<sup>224</sup> This symbolises the lack of financial prudence that is symptomatic of the recklessness that the political class has come to represent which is evident in the mismanagement of the economy.

### 3.8.1.5 Subjugation of Institutions

Since Independence, Nigeria has had governance architecture characterised by strong leaders backed by regional/tribal affiliations that operate a notch higher than institutions and institutional arrangements. This development that led to the elevation of leaders above institutions is a product of the manner in which powers and responsibilities were allocated in the tripod power sharing arrangement of the political system.

The overreaching powers vested in the office of the head of state has made the functioning of other democratic supporting critical institutions almost impossible. It has been contended, and not without merit, that the President under Nigeria's current constitutional dispensation is the most powerful President in the world, vested with almost limitless powers that enable him to attempt to do the impossible.<sup>225</sup> As evidence,

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<sup>223</sup> Siollun, M., *Oil Politics and Violence: Nigeria's Military Coup Culture*, Algora Publishing, New York, 2009.

<sup>224</sup> A Nigerian legislator receives an annual salary of about \$189,000, equivalent of N30 million, which is 116 times the country's gross domestic product (GDP). The figures put salaries collected by Nigerian senators and members of the House of Representatives way ahead of those received by fellow parliamentarians in the 29 countries whose data was analysed by the Economist. In terms of volume of cash earnings, the Nigerian legislators beat their counterparts in Britain who take \$105,400 yearly, as well as those in the United States (\$174,000), France (\$85,900), South Africa (\$104,000), Kenya (\$74,500), Saudi Arabia (\$64,000) and Brazil (\$157,600). In terms of lawmakers' salaries as a ratio of GDP per capita, the gap is even much wider. While the salary of a Nigerian lawmaker is 116 times the country's GDP per person, that of a British member of parliament is just 2.7 times. Source: Daily Trust Newspaper, Nigeria, 22 July 2013.

<sup>225</sup> Rev. Father Matthew Kukah, Catholic Bishop of Sokoto, in an address at the opening of the Nigerian Bar Association Annual General Conference in Abuja on the 27th of August 2012.

all the critical institutions supporting democratic governance are susceptible to influence, control and abuse by the political head. For example, the powers of appointment ( and by legal implication, dismissal) of the heads of the electoral body, the federal courts, security agencies, heads of government agencies, agencies in direct control of regulating the economic sphere (monetary and fiscal policies, stock markets and regulation of companies) all lie with the President. Accompanying this array of powers is an unrestrained measure of discretion with which these powers are exercised. Where unrestrained discretion reigns, there can be no predictability in the decision-making processes. This gives room for unbridled corruption, as the exercise of discretion without boundaries can be arbitrary and capricious.<sup>226</sup>

The above political landscape has distorted the power equilibrium, with the creation of strong leaders instead of strong institutions. A broken electoral system ensures that political leaders emerge through a flawed process that does not equip them to lead, thus lending credence to the often-quoted statement by Lord Acton that “power tends to corrupt and absolute power corrupts absolutely.”<sup>227</sup> It further validates the argument of this research that the nature of the power architecture within Nigeria’s power system does not lend itself easily to the thriving of IRAs, as there are no good institutions but strong leaders. The tabulation of the ill prepared leaders that have emerged since independence has, not surprisingly, led to a governance architecture that has lent itself to corruption, mismanagement of the economy, and a lack of respect for rule of law precepts, and has led to the subjugation of regulatory institutions including IRAs, to the rule of men instead of the men being under these institutions.

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<sup>226</sup> Oluba, M., *The Rule of Law and Economic Development in Nigeria*, Economic Reflections, [www.martinoluba.com](http://www.martinoluba.com).

<sup>227</sup> Statement attributed to Lord Acton, 1834 – 1902 who wrote them in a letter to Bishop Mandell Creighton on April 5, 1887.



### 3.9 Conclusion

Drawing from the foregoing plethora of literature underlining the primacy of institutions for economic growth and effective functioning of the IRA model of regulatory governance, this thesis seeks to establish that the IRA model has had a stormy reception within the Nigeria context because of the intemperate institutional fragilities that surround the political and supporting institutions dissected.

The political institutions discussed lie at a critical intersection of Nigeria's constitutional democracy. They originate and determine the direction the nation should go. They develop the framework under which the different arms of government would function and inter-relate. They delineate the contours of all institutions in a bid to achieve harmony and development. Thus, all the other supporting institutions draw their life and legality from political institutions without which they will exist in a vacuum and lack legitimacy. Given their importance therefore, their present fragile state does not augur well for the successful transplant of the IRA model.

As a further exacerbating point, this thesis has established that all the supporting institutions that ought to encourage and pressure political institutions to be alive to their mandate and responsibilities are equally in a weakened state.

Therefore, within the context of a political leadership that has always emerged unprepared to lead, corrupt, lacking in respect for the rule of law and basic human rights, it is not surprising that the outcome in economic terms has been dismal. The political leadership in a quest to consolidate power has always worked towards subjugating and dominating institutions and institutional frameworks that should have precedence over them.

The identified weaknesses portend a grim future for the effective working of the IRA model since its emergence, survival and proper functioning depends wholly on these fragile political and supporting institutions.

Chapter Four will consider the state of economic, financial, law enforcement and capacity building institutions in Nigeria and their likely impact on the IRA model of regulatory governance.

## CHAPTER 4

### ECONOMIC AND ENABLING INSTITUTIONS

#### 4.1 Introduction

Chapter 3 undertook a discourse on institutions generally, and political institutions and other enabling institutions in particular, and their relevance to the effective functioning of the IRA model of governance. An analysis of their condition was carried out which turned in a verdict of fragility. In addition to those set of institutions discussed in Chapter 3, there is another set that are economic in nature and essential for IRAs to thrive. This thesis generically refers to them as economic institutions. This chapter discusses that second set of institutions and indicates their relevance to the IRA model. Further, an informed position is taken as to whether these set of institutions is viable enough to support the IRA model in Nigeria. In conclusion, the chapter considers the adequacy or otherwise of the facilitating role of capacity building institutions and the effect of insecurity on investments.

Institutions generally encompass a variety of legal entities such as parliaments, the executive, judiciary, legislative houses, and central banks, and extend to any processes or systems that regulate the interaction between members of a given society in the different spheres of life.<sup>1</sup> Economic institutions, as a subset of these institutions, have three primary functions. First, they determine and protect property rights; second, they facilitate transactions; and finally, they permit economic participants in the market place to cohabit and operate in a lawful manner.

To aid in identifying which institutions are of an economic nature, following the lead of Wiggins and Davis,<sup>2</sup> this thesis indicates that economic institutions are the

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<sup>1</sup> Brunt, L., *Which Institutions matter for Economic Growth*, in *Property Rights and Economic Growth: Evidence from a Natural Experiment*, CEPR DP 6404. September 2007; Soysa, I.D, and Jutting, J., *Informal Institutions and Development – Think Local, Act Global*, 2006, OECG Development Centre and Development International Seminar on Informal Institutions and Development – What do we know and what can we do?.

<sup>2</sup>Wiggins, S., and Davis, J., *Economic Institutions*, IPPG Briefing Paper No. Three, July 2006 at 3.

restraints on human interactions in the market place that seek to protect and preserve property rights and facilitate a favourable atmosphere for business activities. These generically include a property rights enforcement regime that encompasses both movable and immovable property and financial institutions.

Furthermore, property rights, which are at the heart of economic freedom under capitalism, have engaged the economic world for more than 200 years in a great intellectual debate. This debate has been driven mostly by philosophers and economists who advocate an economic system based on private property and free markets – or what one can refer to as economic freedom. The essentials of economic freedom are individual choice, voluntary exchange, freedom to compete in markets, and protection of person and property. Thus, institutions that promote economic freedom by allowing voluntary exchange and protection of individuals and their property are economic in nature.<sup>3</sup>

Several indices point to the direct correlation between economic freedom, which is defined as security of legally acquired property rights, freedom to transact business, freedom from governmental control on the specific terms in which an individual can transact and freedom from governmental expropriation of property rights, and economic prosperity.<sup>4</sup> Particularly, Hanke and Walters illustrate clearly through five surveys<sup>5</sup> measuring economic freedom that countries with a high level of economic freedom tend to achieve growth. Conversely, the surveys indicate that the overwhelming majority of countries with low levels of economic freedom experience decline in economic growth and per capita GDP.<sup>6</sup>

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<sup>3</sup> Lawson, R.A., *Economic Freedom*, The Concise Encyclopedia of Economics, 2<sup>nd</sup> Edition, 2008.

<sup>4</sup> Mills, G and Herbst, J., *Africa's Third Liberation: The new search for Prosperity and jobs*, 2012, Penguin Books (South Africa)Ltd at 16.

<sup>5</sup> The Fraser Institute's Economic Freedom of the World Index; Freedom House's Economic Freedom Indicators; The Heritage Foundation's Index of Economic Freedom; the International Institute for Management Development's World Competitiveness Yearbook; and the World Economic Forum's Global Competitiveness Report.

<sup>6</sup> Mills and Herbst, note 4.

## 4.2 Property Rights

Recent studies indicate that a well-defined and applied property rights regime is the most important among economic institutions in tailoring sustainable economic growth and the accompanying prosperity in a nation.<sup>7</sup> Securing private property rights in the United States in the early stages of its life as a nation and in Japan after World War 2 were what served as a springboard for wealth generation in the two nations.<sup>8</sup>

Prevailing literature in the property rights school of economic thought identifies three essential attributes embedded in property rights.<sup>9</sup> The first is the exclusive authority to determine how a resource is used, whether that resource is owned by government or by an individual, as the owner deems fit, as long as this does not infringe on another's rights. Second is the exclusive right to the services of that resource to the exclusion of others. Third is the right and ability of an owner to deal with the resource as he deems fit, including delegation, renting, or selling any portion of the rights by exchange or gift, at whatever price the owner determines (provided someone is willing to pay that price).

The relevance of private property rights is highlighted when considered in contradistinction with common property. While private property rights ideally are "complete, secure and transferable" and provide the owner with the rights of "possession, transfer, use change and destruction

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<sup>7</sup>Acemoglu D., and Johnson S., *Unbundling institutions*, 2005, Journal of Political Economy Vol. 113, No. 5, at 949-95; Rodrik, D., et al, 2002, *Institutions rule: the primacy of institutions over integration and geography in economic development*, IMF Working Paper, WP/02/189, Washington DC, International Monetary Fund.

<sup>8</sup> Moghalu, C.K., *Emerging Africa, How the Global Economy of the 'Last Frontier' can prosper and matter*, Penguin Books, London, 2014 at 65.

<sup>9</sup> Coase, R., *The Problem of Social Costs*, Journal of Law and Economics (1960) at 1-5; Alchianm A.A., *Economic Forces at Work*, Liberty Press, 1977 at 130; O'Driscoll, Jr, and Hoskins L., *Property Rights: The Key to Economic Development*, Policy Analysis, No 482, August 7, 2003; Milton Friedman Commanding Heights interview conducted on 10/01/00 *On Freedom and Free Markets*, [http://www.pbs.org/wgbh/commandingheights/shared/minitext/int\\_miltonfriedman.html](http://www.pbs.org/wgbh/commandingheights/shared/minitext/int_miltonfriedman.html).

of the asset”; common property on the other hand refers to assets under communal ownership; and rights thereto are defined by an individual’s membership of that community.<sup>10</sup>

Thus, the confidence that comes from the knowledge that one can possess and enjoy, without arbitrary abridgment, the fruit of one’s labours, be it landed property or an invention, serves as a powerful incentive for innovation and wealth gathering. This control propels owners to seek the attainment of the highest benefits such a resource can accrue to them.<sup>11</sup>

The importance of property rights to economic growth and development in the developing world was brought into sharp focus by the work of the Peruvian economist and developmental thinker, Hernando de Soto,<sup>12</sup> whose thesis pointed out the benefits of property rights to owners. De Soto wrote on how developing countries could leverage on the otherwise “dead” but potentially very viable asset, private property, to raise their fortunes.

Within the confines of this thesis, however, reiteration is made of the global opinion among political, legal and economic writers that an effective property rights regime is essential for the IRA model to succeed within a nation’s economy. Given this acknowledgement and considering the fact that property rights are actually the basis upon which the capitalist system exists, this research seeks to explore Nigeria’s attitude to it.

#### **4.2.1 Legal Protection of Property Rights in Nigeria**

Several legal instruments, both local and international, govern the protection of property rights regime in Nigeria. Section 44 of the 1999 Constitution provides that

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<sup>10</sup> Heltberg, R., *Property Rights and Natural Resource Management in Developing Countries*, Journal of Economic Surveys, Vol. 16, No. 2 at 193-194.

<sup>11</sup> O’Driscoll and Hoskins, note 9.

<sup>12</sup> De Soto, H., *The mystery of capital: Why capitalism succeeds in the West and fails everywhere else*, 2000, New York: Basic Books.

“moveable property and any interest in an immoveable property” cannot be compulsorily taken unless done in accordance with a law while the person is compensated promptly, and allowed access to court. Section 25 of the Nigerian Investment Promotion Commission (NIPC) Act<sup>13</sup> states that “no enterprise shall be nationalised or expropriated,” nor would any person who has capital in such an enterprise be forced to surrender it. It requires that any acquisition must be in the national interest or for a public purpose in accordance with a law which provides for fair and adequate compensation, without undue delay. Furthermore, Article 14 of the African Charter on Human & Peoples Rights (Ratification and Enforcement) Act (ACHPR)<sup>14</sup> also states that “The right to property shall be guaranteed,” and can only be encroached upon in the interest of public need and in accordance with appropriate laws.

In exploring whether the legal protection of private property in Nigeria is adequate or not, this research dwells majorly on property rights in moveable and immovable. These set of rights are the ones are relevant to and affect the functioning of IRAs.

#### 4.2.1.1 *Immoveable Property*

Even though provisions in the 1999 Constitution, NIPC Act and the ACHPR Act all grant rights in and over immoveable property such as landed property, by the operation of the Land Use Act<sup>15</sup> these rights have been weakened and their enforcement made difficult by local extenuating circumstances in a number of ways.

Firstly, under the Land Use Act, no individual has absolute ownership of land<sup>16</sup> and all an individual can lay lawful claim to is a usufructuary right<sup>17</sup> which is for a

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<sup>13</sup> Laws of the Federation 2004 Cap 117.

<sup>14</sup> African Charter of Human and Peoples Rights (Ratification and Enforcement) Act Laws of the Federation 2004 Cap A9 Land Use Act Cap 202, LFN 1990.

<sup>15</sup> Cap 202, LFN 1990.

<sup>16</sup> By virtue of Section 1 of the Act, all lands vests in the Governor of a state and individuals only enjoy a Right of Occupancy, whether granted or deemed

fixed term after which it reverts to the state. This means that any private property right acquired is not absolute but time bound. Secondly, the Land Use Act abridges the essence of the rights granted by requiring the consent of the Governor before any title to land can be transferred.<sup>18</sup> The requirement of consent has constituted a clog in the wheel of alienation of rights to land as Governors in practice hardly ever grant the consent and where the grant is approved, the process is laborious and costly.<sup>19</sup> The essential character and usefulness of an acquired right as commodity in the market place diminishes where it cannot be easily assigned in the normal course of business. Thirdly, the time it takes for courts to resolve disputes arising from the abridgment of landed property rights ranges from 10 -12 years<sup>20</sup> and is a major disincentive for the acquisition of the title in the first place.

Fourthly, the legal protection of property rights of groups such as children, women, the disabled, elders, and minorities is weak and transient, dependent on age and the nature of marriage<sup>21</sup> thus introducing much uncertainty. Most of the rights accruable to women and the girl child depend on the nature of marriage contracted. This is against the background in certain cultural settings where women, and by extension the girl child, are considered chattel, and therefore unable to own or enforce property rights.<sup>22</sup> Even though women make up over 70% of Africa's farmers,<sup>23</sup> cultural

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<sup>17</sup> Usufruct is a limited title derived in law that unites the two property interests of usage (enjoyment without altering its essential character) and derivation of profit from a thing possessed. It is usually granted for a term after which it reverts to the grantor.

<sup>18</sup> Section 26, Land Use Act

<sup>19</sup> Lagos Chamber of Commerce and Industry Resolution at Third Business Environment Roundtable organised by Lagos Chamber of Commerce and Industry (LCCI), reported in Vanguard Newspaper, Nigeria, October 10, 2010 on the use of landed properties as collateral.

<sup>20</sup> Source: NationMaster.com.

<sup>21</sup> Olubor J.J., *The Legal Rights Of The Vulnerable Groups Vis-À-Vis Customary Practices*, a paper presented at the Refresher Course for Judges and Kadis from 23 – 27 MARCH, 2009.

<sup>22</sup> *Suberu v. Sunmonu*, Supreme Court of Nigeria Law Reports (SCNLR) reproduced in Olubor J.J., *The Legal Rights Of The Vulnerable Groups Vis-À-Vis Customary Practices* a Paper presented at the Refresher Course for Judges and Kadis from 23 – 27 March, 2009 at 15.

<sup>23</sup> Byamugisha, F.F.K., *Securing Africa's Land for Shared Prosperity*, The World Bank, 2013; Aluko, B.J., and Amidu A.R., *Women and Land Rights Reforms in Nigeria*, March, 2006. [www.fig.net/pub/accra/papers/ts09/ts09\\_04\\_aluko\\_amidu.pdf](http://www.fig.net/pub/accra/papers/ts09/ts09_04_aluko_amidu.pdf).



restrictions preclude them from acquiring ownership rights over lands they cultivate because of societal impediments that disallow them from holding titles.

Fifthly, the transfer of landed property rights by owners in business transactions has a major cultural barrier. The obsession the average Nigerian has for and the way he perceives land transcends the legal to a spiritual dimension, especially in cases of ancestral lands. Most landowners see land passed on from deceased parents as “family” property that cannot be alienated to non-family members in any form. This militates against the normal assignment of lands as private property in business transactions.<sup>24</sup>

A study regarding registration of titles to land undertaken by the World Bank on Doing Business in Nigeria in 2013 indicates that Nigeria ranks a lowly 185th position out of 189 countries surveyed in the ease of registering titles. There are a staggering 13 stages of requirements, spanning a typical average period of 77 days before registration, attracting over 20% of the value of the property.<sup>25</sup> This finding is corroborated by the International Property Markets Scorecard of 2013, which ranks Nigeria in a position of 182 out of 185 countries surveyed, with the number of procedural steps required to be taken before title can pass being 13, and spanning 82 days.

Registering title to land is central to ascertaining and asserting rights accruable in landed property. It has many advantages including enabling the creation of a land market, for ease of transferability of lands for commercial transactions, among others.<sup>26</sup> Quite apart from the fact that the governing law for registration of titles predates Nigeria as a political entity, which makes it anachronistic and outdated, most of the

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<sup>24</sup>Mkapa, B.W., *Leadership for Growth, Development and Poverty Reduction: An African Viewpoint and Experience*, in Brady, D., and Spence, M., eds, *Leadership and Growth*, Commission on Growth and Development, International Bank for Reconstruction and Development, 2010 at 51.

<sup>25</sup> World Bank Group, *Doing Business in Nigeria, Measuring Business Regulations*, 2013.

<sup>26</sup> FAO Agriculture paper in Elley, T.K, *Why Africa Fails: The Case for Growth before Democracy*, Tafelberg, NB Publishers, Cape Town, RSA at 119.

states within the Federation, with the exception of a very few like Lagos, have not domesticated and set up land registries to properly document land titles.<sup>27</sup>

Thus, the fluidity and uncertainty that trails the enforceability of immovable property rights, especially in financial transactions, constitutes a hindrance to raising capital and depresses investments, by making their convertibility cumbersome. This in turn serves as a hindrance to private sector investments and makes untenable the case for the role and existence of IRAs, as there would be no infrastructure service providers for IRAs to regulate.

#### 4.2.1.2 *Moveable and Intangible Property*

This category of rights includes rights in Intellectual Property and Licences or any rights that, though they accrue to a person, are of an intangible nature.

##### 4.2.1.2.1 *Intellectual Property*

The World Intellectual Property Organization defines Intellectual Property (IP) as creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.<sup>28</sup> Property rights in IP therefore, refers to rights in those creations of the mind such as inventions, industrial designs, symbols, names, and images, among others. Of primary concern to IP rights is the inherent right of originators to own and control their creativity and innovations in the same manner as a physical property owner does. The IP regime promotes innovation while simultaneously offering to society the privilege and benefit to enjoy the fruits of such innovation, without derogating from the rights of the innovator and the benefits that accrue to that invention.

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<sup>27</sup>Registration of Titles Act of 1935. The law was introduced to correct the inadequacies in the registration of instrument Act of 1924. The basic principle of the Registration of Titles law is that ownership of title to land is based on the fact of registration, that is, it operates to register dealings and transactions over titles in land when such titles have been registered.

<sup>28</sup> The World Intellectual Property Organization (WIPO), <http://www.wipo.int/about-ip/en/>.

Recent trends point to the reality that the 21<sup>st</sup> century global economy is essentially a knowledge-driven one and for any nation to secure a foothold in it, technology, knowledge, and innovation must underpin its efforts.<sup>29</sup> IP is that engine driver of the knowledge economy upon which most of the world economy runs, and is in fact, particularly the bedrock upon which most of the developed and emerging (BRIC countries) economies were and are running. Where inventors have protection for their inventions, it incentivises them to excel and to commercialise their inventions for gain. It was the patenting and commercialisation of groundbreaking inventions of the 18<sup>th</sup> and 20<sup>th</sup> centuries that ignited economic development in Europe.<sup>30</sup>

In the Nigerian context, four basic laws govern the IP regime. They are the Trademarks Act, 1965 for trademarks, the Design and Patent Act, 1970 for designs, the Design and Patent Act, 1970 for industrial design, and the Nigerian Copyright Act, 1999 for copyright. In spite of the array of laws ostensibly meant to secure the protection of IP, one cannot but note that all these laws are of a colonial pedigree having been fashioned by the English legal system during the colonial era. It is instructive to note that even though the English laws have undergone several amendments to bring them in line with fast-paced technological advancements, the Nigerian versions remain frozen in time. For instance, the United Kingdom Trademarks Act, on which the Nigerian Trademarks Act is fashioned, has undergone several amendments with the most recent being the Trademarks Act 1994 while the Nigerian version retains its original provisions.

There has been a recent encouraging trend pointing to enforcement mechanisms by the Nigerian Copyright Commission, the government agency responsible for copyright matters. Between October 2011 and February 2012, the courts convicted copyright infringers in more than 18 cases and the Commission is currently prosecuting

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<sup>29</sup>Moghalu, note 8 in Chapter 9.

<sup>30</sup> For example, it was the invention of the steam engine by James Watt in 1775; the telegraph by Samuel Morse in 1835; the adaptation of the electric power for industrial and domestic use by Michael Faraday who invented the electric motor in 1821; and Thomas Edison who invented the light bulb in 1879 that propelled economic development and the accompanying industrial revolution.

over 70 criminal cases at the various divisions of the Federal High Court nationwide. Between January 2011 and February 2012, the Commission instituted 26 criminal cases covering the various categories of copyright infringement, namely books, CDs, software, and broadcast. So far, 18 of the cases have resulted in convictions of the accused persons with various levels of sentences imposed in accordance with the provisions of the Copyright Act.<sup>31</sup>

Apart from the archaic laws, the legal protection of IP rights in Nigeria suffers from several limitations<sup>32</sup> among which are lack of awareness of its potential; a lack of political will in enforcing IP Laws; and the non-registration of most innovations partly out of ignorance. An example of the challenges facing the IP regime in Nigeria is the entertainment industry, popularly called Nollywood. Rated as the second largest film industry in the world in number of annual film productions, ranking ahead of the United States and only behind India, with over 200 home videos produced every month attracting billions of dollars of investment and revenue, protection against copying and infringement is very weak, almost non-existent.<sup>33</sup>

Under international investment law statute books, IP rights are in law given high protection in sub-Saharan Africa. This probably as a result of the countries' membership, including Nigeria, in the World Trade Organisation which places an obligation on them to do so under its Trade Related Intellectual Property Rights framework (TRIPS).<sup>34</sup> It is, however, an open question as to whether these rights can find actual protection in the law courts due to the absence of political will on the part of Government to enforce them.

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<sup>31</sup> Intellectual Property Watch, <http://www.ip-watch.org/2012/03/21/nigerian-courts-step-up-against-copyright-piracy-18-convicted/> accessed on 30/5/2015 at 9.34pm.

<sup>32</sup> Jackson Etti & Edu, *Nigeria: Intellectual Property: A Tool For Economic Growth In Nigeria*, <http://www.mondaq.com/> accessed at 11.53pm on 23/9/14.

<sup>33</sup> [http://en.wikipedia.org/wiki/Cinema\\_of\\_Nigeria](http://en.wikipedia.org/wiki/Cinema_of_Nigeria) assessed at 10.59am on 24/9/14. See also, "Nigeria surpasses Hollywood as world's second largest film producer – UN". United Nations, 2009-05-05 accessed on 2013-03-26 and "Nigeria's Nollywood eclipsing Hollywood in Africa". The Independent, (London), May 15, 2010 accessed 2010-11-24.

<sup>34</sup> Adaralegbe, B., Foreign Private Participation in the Electricity Sector of Developing Countries: What Works? An Examination of Nigeria's Reformed Electricity Sector, *Journal of World Investment & Trade* (Vol. 10, no. 2, April 2009) at 11.

#### 4.2.1.2.2 *Licences*

From the wording of the extant laws cited above,<sup>35</sup> it is clear that physical properties (both moveable and immovable) enjoy protection of the rights in them. It is however important to establish whether intangible property rights such as shares and licences are protected by the legislation, for two reasons. Firstly, the regulatory instruments utilised by IRAs to bring providers of infrastructures and services within their regulatory control include the issuing of licences, permits or authorisations. It is therefore important to ascertain whether these rights acquired by licensees (for example a license to generate power or to operate a rail line) are protected. Secondly, as Adaralegbe<sup>36</sup> posits, the international trend of the 1970s where countries expropriated foreign investments, has now given way to a more “subtle, indirect form, known as creeping expropriation” where a tenured licence given for the provision of an infrastructure or service is terminated before its expiration, leaving the going concern and the ownership of physical assets intact. It is therefore apt to establish whether rights acquired that are on an intangible nature such as licences come under the protection of the legal framework aforesaid.

Kolo argues that the termination of licences in Nigeria without due cause is a breach of Section 44 of the 1999 Constitution, maintaining that the concept of property, being dynamic, includes both tangible and intangible properties such as shares, intellectual property licences, and contractual rights.<sup>37</sup> However, Popoola<sup>38</sup> takes an opposing position, arguing that intangible rights such as shares and licences are not protected under the 1999 Constitution. Popoola’s argument appears to stand on a faulty foundation being one that has been overtaken by the law. The prevailing argument in

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<sup>35</sup> 1999 Constitution, African Charter of Human and Peoples Rights (Ratification and Enforcement) Act Laws of the Federation 2004 and Nigerian Investment Promotion Commission (NIPC) Act.

<sup>36</sup> Adaralegbe, note 34.

<sup>37</sup> Kolo, A, *Legal Issues Arising from the Termination of Oil Prospecting Licenses by Nigerian Government* (2001) JENRL; Kolo, A, “Managing Post Privatisation Political & Regulatory Risks in Nigeria- Law & Policy Perspective” (2004) JENRL.

<sup>38</sup> Popoola, A.O., *Consumer Protection within the Framework of Economic Liberation: The Impact of Privatisation, Commercialisation and Deregulation on Consumers in Ayua, I, & Guobadia, D, (ed.) Political Reform and Economic Recovery in Nigeria* (NIALS, Lagos 2001).

the past had been that licences merely contained regulatory prescriptions expressed in contract form and of an impersonal nature, and thus did not create property rights. That position has now been overtaken by the view that holds that licences do create property rights. It is now settled law that licences create property rights.<sup>39</sup>

Having considered the legal framework for property rights protection in Nigeria, this thesis concludes that even though the framework exists in the statute books, it is characterised by weak enforcement and is thus ineffective in protecting property rights. Global rankings<sup>40</sup> on the protection of property rights derived from three international databanks and surveys and a review of literature on the legal protection of property rights confirm the above conclusion.

#### **4.2.2 Enablers to the Enforcement of Property Rights**

With the conclusion that Nigeria offers legal protection for private property rights, a brief discussion is undertaken on certain key enablers to the enforcement of the rights. These include legal frameworks for competition, weights, measures and standards and corporate governance.

##### *4.2.2.1 Competition*

A competition law regime is a set of rules, disciplines and judicial decisions relating to agreements either between firms that restrict competition or to the concentration or abuse of market power on the part of private firms.<sup>41</sup> Competition among different players in the market is the “lifeblood of strong and effective markets”<sup>42</sup> and is an

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<sup>39</sup> Daintith, T, *Petroleum Licenses: A Comparative Introduction* in Daintith, T (ed.) *The Legal Character of Petroleum Licenses*, 1981 The University of Dundee, Centre for Petroleum and Mineral Law Studies, and Energy and Natural Resources Committee of the International Bar Association, 1981 at 9.

<sup>40</sup> International Property Markets Scorecard of 2013, an initiative of the Centre for International Private Enterprise (CIPE) and the International Real Property Foundation (IRPF); 2014 Index of Economic Freedom ; International Property Rights Index, 2013.

<sup>41</sup> Dimgba, N., *Introduction to Competition Law: a sine qua non to a Liberalised*, Rules Watch: Competition Legislation and the New World Order 24/26 May 2006, Lagos Nigeria.

<sup>42</sup> See UK government White Paper Productivity and Enterprise (Cm. 5233, July 2001), cited in Mark Furse, *supra*. A contrast is usually drawn with the collapse of East European planned economies, and the corresponding prosperity of Western market economies.

essential element in the efficient working of markets. It promotes efficiency, encourages innovation, improves quality,<sup>43</sup> and widens choice by enabling consumers to buy the goods and services they want at the best possible price, reduces costs, and leads to lower prices of goods and services, thus contributing to national competitiveness.<sup>44</sup>

The relevance of a competition law framework to the viability of IRAs lies in the fact that where competition exists in the provision of infrastructures and services, the market is widened, allowing for innovation and quality among players with the consumer getting the ultimate benefit. These aggregate to an IRA that is considered a market-creating, sustaining and stimulating one. It deploys all the necessary regulatory tools to tailor the behaviour of regulated firms to secure the best products and services at the best possible prices for consumers. The service providers themselves are then also able to recover their investments. In that way, everyone in the value chain is a winner.

Even though Nigeria commenced a liberalisation and privatisation programme in the 1980s that witnessed the emergence of the private sector as an engine room of economic growth with the public sector taking a back seat, no competition law framework was instituted. This has led to major distortions in the market place. Innovation has been stifled and cartel-like tendencies such as price fixing, collusion, and monopolies abound.<sup>45</sup> Evidence of these unwholesome manifestations is all too glaring with single companies dominating, controlling and restricting market entry in several

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<sup>43</sup>Lahouel, M., and Maskus, K.,

*Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement*, paper presented at a WTO / World Bank Conference in the WTO Secretariat, Geneva Switzerland, 20-21 September 1999; also available at <http://www.redem.buap.mx/rm19.htm>  
12 Hansard, House of Lords, 30 October, 1999.

<sup>44</sup>Ani, L., *Rethinking Competition Law and Policy: Building A Framework for Implementation in Nigeria*, ed. Epiphany Azinge and Laura Ani, Nigerian Institute of Advanced Legal Studies, 2012.

<sup>45</sup> Dikki, B.E., Comments Made by the Director-General of the Bureau of Public Enterprises on the Occasion of the Stakeholders Engagement on the Draft Competition and Consumer Protection Policy to the Organized Business Community organized by the Federal Ministry Of Industry, Trade and Investments held on Monday, May 5, 2014.

sectors of the economy such as cement, international air travel, sugar and flour, among others.<sup>46</sup>

The absence of an overarching competition law framework for Nigeria has left the field open for monopolists to prowl. Thus IRAs, though set up in some of the infrastructure sectors, are handicapped in addressing the distortions. A robust competition law and regulatory framework is the tonic that would unleash the full potential of IRAs to correct the current market dis-equilibrium.

#### 4.2.2.2 *Weights, Measures and Standards*

Weights, measures and standards are enforcement mechanisms encapsulated under the term legal metrology, which is the science of measurement that provides regulations for the control of measurements and measuring instruments. Interactions in the market place involving consumers, traders, government regulators and the industrial sector require accurate measurements. Weights and measures are central to a sustainable trading economy and the concept of buying and selling cannot exist without pre-settled weights, measures, and standards. These mechanisms work to ensure that all players in the market place have confidence in the system that ensures correct measures, fair play, and fair dealings among each other.<sup>47</sup>

In the Nigerian context, the legal framework is made up of the Weights and Measures Act CAP W3LFN, 2004 (Formally Weights & Measures Act CAP 467LFN 1999); Pre-Shipment Inspection of Export Act CAP P25 LFN, 2004; Weights and Measures Standardization of Indigenous Measures Regulations, 1992; and the Weights and Measures Fees Regulations. The legal framework empowers the implementation organ (Department of Weights and Measurement of the Federal Ministry of Industry, Trade and Investment) to certify and check the compliance of all measuring and

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<sup>46</sup>Dimgba note 41; *ibid*.

<sup>47</sup> Weights And Measures Department of the Federal Ministry of Industry, Trade and Investment website accessed at 24/9/14 at 8.37pm.



weighing equipment in all sectors of the nation's economy at the Federal, State, and Local government levels.

Even though this legal and regulatory regime is on the statute books, implementation and enforcement observance are more in the breach. The reasons for this include widespread illiteracy and ignorance about the regime among the populace and the bureaucratic structure of the implementation that makes response time and effectiveness difficult.

In addition, IRAs that are by law required to enforce these standards on providers of infrastructures and services do not have any interface with the enabling legislation to carry out that function. The extant legislation<sup>48</sup> does not recognise the role of IRAs in regulating measures, weights and standards. Given the nature of the legislation therefore, there will be resistance from the department of government presently enforcing these standards in the vent that IRAs attempt to enforce them. This has led to a lack of clarity in the enforcement regime. The lack of effective regulation has opened the doors to several variations in the weights and measures used in different localities. These often lead to chaotic situations in the market place making otherwise seamless day-to-day transactions laborious, with the associated high transaction costs, thus hindering the pace of growth of trade and commerce.

#### 4.2.2.3 *Corporate Governance*

Corporate governance is about the effective, transparent, and accountable governance of affairs of an organisation by its management and board of directors. It hinges on a clearly delineated process of directing and controlling the management of business entities based on principles of integrity, honesty, transparency, and accountability in order to satisfy the interests of all stakeholders.<sup>49</sup> The growing consensus that good

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<sup>48</sup> Weights and Measures Act CAP W3LFN, 2004 (Formally Weights & Measures Act CAP 467LFN 1999); Pre-Shipment Inspection of Export Act CAP P25 LFN, 2004; Weights and Measures Standardization of Indigenous Measures Regulations, 1992; and the Weights and Measures Fees Regulations.

<sup>49</sup> Oso, L. and Bello Semiu, B, *The Concept and Practice of Corporate Governance in Nigeria: The Need for Public Relations and Effective Corporate Communication*, J Communication, 3(1): 1-16, 2012.

corporate governance has a positive link to national economic growth and development underpins its relevance.<sup>50</sup>

Where infrastructure service providers fail because of corporate governance infractions, it invariably has a negative bearing on the regulatory effectiveness of IRAs. Regulation has an oversight function of ensuring that regulated entities carry on business ethically and in terms of the licence conditions. Where a corporate governance regime is ineffective, it diminishes the space and legitimacy of the IRA regulating that particular sector.

A survey by Nigeria's Securities and Exchange Commission in 2003 showed that corporate governance institutionalisation is at a rudimentary stage; as only about 40% of quoted companies in Nigeria have recognised codes of corporate governance in place.<sup>51</sup>

In the recent past, government agencies have sought to institute corporate governance codes within their organisations. Idornigie discloses that there is a multiplicity of codes of corporate governance in Nigeria thus creating confusion and a lack of clarity in the market place.<sup>52</sup> They include the Central Bank of Nigeria (CBN) Code, 2014; Nigerian Communications Commission Governance Code, 2014, National Insurance Commission (NAICOM) Code 2009; Pension Commission (PENCOM) Code 2008; and the Securities and Exchange Commission Code, 2003. There are doubts as to the effectiveness of the country's regulatory institutions to tackle corporate corruption and safeguard against the loss of investors' wealth (particularly that of minority shareholders), because of the multiplicity of codes and their haphazard enforcement. The 2004 World Bank's Report on the Observance of Standards and Codes in Nigerian

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<sup>50</sup>Nwachukwu, C.C., *Understanding Share Registration in Nigeria. A Contemporary Issue and Management*, 2007, Lagos. America Ltd.

<sup>51</sup>Ejubekpokpo, A., and Esuikie, B.U., *Corporate governance issues and its implementation: The Nigerian experience*, Journal of Research in International Business Management (ISSN: 2251-0028) Vol. 3(2) pp. 53-57, February, 2013 at 56.

<sup>52</sup>Idornigie P.O., *Enhancing corporate value through the Harmonization of corporate value through the Harmonization of corporate codes*, 2010, A paper presented at the 34th Annual conference of ICSAN, Sheraton Hotels and Towers, September 22nd and 23rd Lagos.

accounting and auditing practice revealed enormous institutional weaknesses in regulation, compliance, and enforcement.

The conclusion by the 2004 World Bank Report validates the argument about the weak institutional capacity in the corporate governance regime in Nigeria and further strengthens the position of this thesis that the IRA model faces major challenges where companies are unable or unwilling to run entities ethically and professionally.<sup>53</sup>

As a follow up to the discussion on the legal regime of property rights in Nigeria, this thesis shifts attention to a consideration of other important economic institutions that operate under the nomenclature of financial institutions.

### **4.2.3 Financial Institutions**

An efficient and well-crafted financial system that is responsive to the financial needs of infrastructure service providers is a crucial ingredient in the provision of infrastructures and services that advances economic development.<sup>54</sup> The role of IRAs only emerges when infrastructure service providers are active within an economic setting and this is more attainable where there is an available pool of resources from financial institutions for lending. It was the responsiveness of the robust financial system that propelled infrastructure service providers to build critical infrastructure and provide services that laid the foundation for regulation of utilities by IRAs in several countries including the US, Britain, Canada, Norway and Sweden.<sup>55</sup> Sanusi, a past Governor of Nigeria's

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<sup>53</sup>Adegbite, E., *Corporate governance in Nigeria: Messes, problems and puzzle*, BusinessDay Newspaper, Nigeria, September 3, 2013.

<sup>54</sup>Schumpeter, J., *The Theory of Economic Development*, Harvard University Press, 1934; Moghalu, note 4; Lora, E., ed., *The State of State Reform in Latin America*, A Co-publication of Stanford Economics and Finance, the World Bank, Inter-American Development Bank, 2007, Stanford University Press; Fry, M. J., *Money, Interest and Banking in Economic Development*, London: John Hopkins University Press, 1988; King, R. G. and Levine, R., *Financial Intermediation and Economic Development*, 1993, In Mayer, C and Vives, X (eds), *Financial Intermediation in the Construction of Europe*, C. London: Centre for Economic Policy Research: 156-189; McKinnon, R., *Money and Capital in Economic Development*, 1973, Washington D.C: The Brookings Institute; Shaw, E. S., *Financial Deepening in Economic Development*, 1973, New York: Oxford University Press.

<sup>55</sup>Moghalu, note 8.

Central Bank likened financial institutions to “the central nervous system of a market economy.”<sup>56</sup>

The different components that make up Nigeria’s financial system include banks, the capital market, finance companies, insurance companies, specialised banks, discount houses, *bureau de change*, mortgage institutions, microfinance banks, and development finance institutions.

Because of the global economic crisis, Nigeria’s financial system underwent systemic changes beginning in the 1980s. It moved from a closed system that was statist in structure and ownership to being almost wholly led by the private sector; and this affected the operational status of the component parts of the system in a fundamental way. In reaction, government undertook major structural reforms in the sector. Three pillars underpinned the reforms: reinforcing the quality of the institutions; establishing financial stability; and enabling healthy financial sector development that contributes to the real economy.<sup>57</sup>

Positive outcomes resulting from these reforms included the shoring up of the nation’s foreign reserves, the stabilising of inflation, and an average annual GDP growth of about 7.5%, making her one of the strongest economies in Africa and one of the fastest-growing in the world.<sup>58</sup> The reforms significantly improved financial services delivery. Long queues in banking halls that were the norm before have given way to electronically based transactions. Bank branch networks have increased from 2500 in 2005 to more than 5000 in mid-2009.<sup>59</sup>

A major milestone indicating the growth of the financial system was the mobilisation of over \$1.8billion as acquisition capital loaned to core investors in the recent sale of 18 successor companies in 2013, unbundled under the privatisation of the

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<sup>56</sup> Sanusi, L. S., *Banking Reform and its Impact on the Nigerian Economy*, being a lecture delivered at the University of Warwick’s Economic Summit, UK, 17th February, 2012

<sup>57</sup> Moghalu, note 8 at 141.

<sup>58</sup> Ibid at 136.

<sup>59</sup> Moghalu, note 8 at 138.

electric power sector. This single transaction, with proceeds exceeding \$3 billion dollars and dubbed the biggest ever privatization transaction in global history, demonstrated the potential that the financial sector, if properly deployed, can unleash on the nation's economic horizon.<sup>60</sup>

Another major benefit of the reforms has been the granting of autonomy to the Central Bank of Nigeria. This step has been responsible for the very positive macroeconomic indicators evidenced by the lower fiscal and GDP ratio; a single digit inflation rate; higher level of external reserves; and higher GDP growth rate, among others.<sup>61</sup>

Notwithstanding the rosy picture presented above, a close survey of the financial system betrays certain traits. Nigeria's financial system is still in a rudimentary state, characterised by poor or in most cases the non-delivery of financial services at affordable costs to sections of the disadvantaged and low-income segments of society. In addition, the system is characterised by inefficiency, illiquidity, and a lack of transparency and accountability,<sup>62</sup> displaying a clear lack of innovation and largely rent-seeking<sup>63</sup> in approach to business. For example, even though lending to the private sector has expanded in the recent past, it is still below average when compared with other emerging markets in Africa.<sup>64</sup> Most financial institutions concentrate on lending to corporate players and multinationals in the market place, pushing aside the middle class, whose participation is essential for economic growth. The lure of pursuing government accounts as opposed to small, middle class accounts, supports the theory of

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<sup>60</sup>Dikki, note 45.

<sup>61</sup>Ogwuma, P., former CBN Governor, Memorandum submitted to the House of Representatives Joint Committee on Banking and Currency and Justice on the CBN draft Bill on October 31, 2012.

<sup>62</sup>Ibid.

<sup>63</sup>Rent-seeking defined in footnote 50 in Chapter 1. Even though the term "rent seeking" is often used interchangeably with "corruption," there is some difference. While corruption involves the misuse of public power for private gain, rent seeking derives from the economic concept of "rent" -- earnings in excess of all relevant costs (including a market rate of return on invested assets). It essentially refers to the acquisition of benefits from natural endowments such as minerals without beneficiation or value added. It is a concept prevalent in many resource rich undeveloped nations such as Nigeria.

<sup>64</sup>Private sector credit to GDP ratio in 2011 was 21.9% compared to 135.1% for South Africa. The ratio of bank assets to GDP is 57% as against 66% in Kenya, 106% in Egypt and 111% in South Africa.

rent seeking<sup>65</sup> that is endemic in the country. Approximately 56.9 million Nigerians, constituting 67.2% of the adult population have never banked<sup>66</sup> while the overall figure of Nigeria's unbanked population currently stands at 46.3%.<sup>67</sup>

Some of the challenges confronting the viability of the financial system include a weak and inefficient system of registering titles to land that constrains the ability of customers, especially the small ones and small and medium scale enterprises (SMEs), to access credit; and the absence of a credit registry or bureaux that has led to a dearth of reliable credit information on customers and borrowers. Another major deficiency in the system is the absence of venture capital constituting the start-up capital needed for micro and medium scale businesses. Venture capital, sometimes called "patient capital",<sup>68</sup> is critical to SMEs as it provides financing to firms that are promising but are either too small or possess an inadequate financial or operating record of accomplishment to access capital from the financial system which may consider the ventures too risky.

Given the importance of capital from financial institutions for the emergence of infrastructure service providers and its link with the emergence of IRAs, Nigeria's challenges listed above constitute a major limitation for the viability of IRAs.

#### *4.2.3.1 Capital Market*

Another component of the financial system that is relevant to the smooth functioning of IRAs is the capital market. Its primary role is to channel long-term financing to firms with relatively high and increasing productivity in order to enhance economic expansion and growth.<sup>69</sup> The main article of trade is medium and long-term financial

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<sup>65</sup>Moghalu, note 8.

<sup>66</sup>Enhancing Financial Access in Africa (EFInA): Financial Access Survey 2010.

<sup>67</sup>Fatokun, D., Director, Banking and Payments System Department, CBN, a speech given at the Ikeja District Society of the Institute of Chartered Accountants of Nigeria, ICAN, in Lagos, Vanguard Newspaper of February 5, 2013, Nigeria accessed on 25/9/14 at 3.13pm.

<sup>68</sup>Ibid, at 156.

<sup>69</sup>Alile, H.I., *The Nigerian Stock Exchange: Historical Perspectives, Operations and Contributions to Economic Development*, Central Bank of Nigerian, 1984, Bullion, 2: 65-69.

instruments usually referred to as securities.<sup>70</sup> The rate of economic growth of any nation is often linked to the sophistication of its capital market efficiency, among others.<sup>71</sup> The capital market has two segments: primary and secondary. Issuing firms (usually called Issuing Houses) issue new securities in the primary market and receive the proceeds of the sale, while the secondary market provides a platform for the sale of existing securities by one investor to another investor. This avenue of available lending capital for infrastructure service providers also provides impetus for the emergence of IRAs, and its weakness has a corresponding impact on their emergence and viability.

In spite of the capital market's potential for cheap long terms funds, Nigerian banks presently provide 90% of the financial needs of firms<sup>72</sup> thus downgrading the potential benefits of the former. The major challenge facing the capital market is its lack of depth when measured by market capitalisation, the total number of listed companies and the volume and value of traded stock. Foreign investors still dominate the market, though there is a gradual but slow entry of indigenous companies.<sup>73</sup> Domestic interest in the capital market steadily climbed and was at an all-time high in the 2000s when, as a result of the global crisis of 2008, over 70% of the value of Nigerian stock was wiped out due to the flight of foreign investors. The capital market then went from being the best performing one in the world in 2007 to the worst in 2008.<sup>74</sup>

Presently the capital market lacks depth with less than 10% of the quoted shares actively traded.<sup>75</sup> The inclusion levels are very low with most of the high performing multinationals remaining outside. Furthermore, the listings on the market represent only 18% of the nation's GDP.

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<sup>70</sup>Adewuyi I. D and Olowookere, J.K., *The Contributions of Capital Market to Economic Development in Nigeria*, International Journal of Economic Development Research and Investment, Vol. 2 No. 1; April 2011.

<sup>71</sup>Ibid.

<sup>72</sup>Moghalu, note 8 at 147

<sup>73</sup>Nwachukwu, I., *Domestic Investors Up Stakes in Nigerian Equities*, Businessday (Lagos) January 10, 2013.

<sup>74</sup>Moghalu, note 8 at 147.

<sup>75</sup> Goddy, E., *Performance of Nigerian Stock Market (1st - 3rd quota)*, 2008, NSE Annual Reports.

### 4.3 Law Enforcement Institutions

Law enforcement is at the heart of any just and normal functioning society. Without law enforcement, there would be anarchy. Law enforcement in broad terms refers to a system by which some members of society act in an organised manner to enforce the law, in order to discover, deter, rehabilitate, or punish persons who violate the rules and norms governing that society.<sup>76</sup> It is only within the framework of law and order that there can be meaningful development that will trigger growth and development in a society both in the physical and economic sense.<sup>77</sup> As Lagarde, the Chairperson of the IMF recently argued, a functioning society needs not just laws that are underpinned by an unwavering respect for the rule of law, but most importantly, the existence of strong law institutions that are capable of implementing and enforcing the law in accordance with its terms.<sup>78</sup>

The significance of law and order to the organised development and growth of a society, both in the physical and economic sense, cannot be overstated. It is only in the presence of a personal peace of mind that one can meaningfully give attention to other issues such as economic development and societal growth.<sup>79</sup> Furthermore, the basic selfish and self-centred nature of humans<sup>80</sup> requires the constraining intervention of state law enforcement institutions to tailor human conduct towards the path of right and just. The place of safety of lives and property is central to the prosperity of capitalism as it seeks to protect and preserve the rights of individuals and all that they have acquired through their hard work.

To understand the relevance and relationship of IRAs to law enforcement institutions it is important to note that IRAs have an array of tools available to them to enforce regulatory compliance with specified rules and regulations that grant entry to infrastructure service providers. One of such tools is the enforcement of its rules,

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<sup>76</sup> New Law Journal - Volume 123, Part 1 - Page 358, 1974.

<sup>77</sup> Otubu, K.O. and Coker, S.A., *Police and Crime Prevention in Nigeria*, [www.unilag.edu.ng/opensoc.php](http://www.unilag.edu.ng/opensoc.php)

<sup>78</sup> Lagarde, C., *Strong Laws and Institutions for a Strong Global Economy*, Washington Foreign Law Society.

<sup>79</sup> Otubu and Coker, note 77.

<sup>80</sup> Ibid.



regulations, orders and rulings. However, since IRAs are not law enforcement agencies *simpliciter*, they require the services of law enforcement agencies, both in the detailed investigations and enforcement of their mandate, especially when faced with recalcitrant players in the regulated industry. Enforcement typically requires coercion, a component of enforcement that only law enforcement possesses.

However, a discussion on the state of law enforcement institutions in Nigeria would be premature without commenting on the looming image and influence of corruption on them. The effectiveness of law enforcement institutions hinges on their responsiveness to the corroding effect of corruption within Nigeria's body politic. As a pointer, a recent poll carried out by NOIPolls, in collaboration with the Gallup Poll of USA, revealed that the Nigerian Police is the most corrupt public institution in Nigeria.<sup>81</sup> The Nigerian Police Force is the face of law enforcement institutions in the country and the above assessment is an indication of the state of law enforcement institutions. An inquiry into their state will therefore throw light on their capacity to fulfil their mandates and further complement the IRAs in the enforcement of their regulatory powers.

#### 4.3.1 Corruption

Khan<sup>82</sup> defines corruption as an act that deviates from formal rules of conduct governing the actions of someone in a position of public authority for private gain. Lipset and Lenz<sup>83</sup> on the other hand, view corruption as an effort to secure wealth or power through illegal means as private gain at public expense, or as misuse of public power for private benefit. The World Bank also views corruption in the same fashion by defining it as the abuse of public office for private gains.<sup>84</sup>

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<sup>81</sup> Thisday Newspaper, Nigeria, 23 March, 2011.

<sup>82</sup> Khan, M. H., *A Typology of Corrupt Transactions in Developing Countries*, 1996, IDS Bulletin in Ajie, H. A. and Wokekoro, O. E., *The Impact of Corruption on Sustainable Economic Growth and Development in Nigeria*, International Journal of Economic Development Research and Investment Vol. 3, No 1, April 2012 at 94.

<sup>83</sup> Lipset, S. M. and Lenz, G. S., *Corruption, Culture, and Markets*, 2000, in *Culture Matters*, Lawrence E. Harrison, and Samuel P. Huntington, eds., (New York: Basic Books, 2000) at 112.

<sup>84</sup> World Bank, *Helping Combat Corruption: The Role of the World Bank*, 1997 in Ajie, note 75.

The challenge with the above definitions is that they betray an essential deficiency: the non-incorporation of corruption in the private spheres of human endeavours, mostly in the private sector of the market place. Corruption exists both in the public and private sectors and this ought to occupy our consideration in the light of the fact that IRAs regulate infrastructure providers in both the private and public sectors. Furthermore, given the elevation of the private sector to an engine room of growth in the Nigerian context, a definition that covers all the sectors will better cover the field and be all embracing.<sup>85</sup>

The definition of corruption by the Asian Development Bank cures this deficiency. The Bank considers corruption to be the abuse of public or private office for personal gain. This includes any behaviour in which people in the public or private sectors improperly and unlawfully enrich themselves or those close to them, or induce others to do so, by misusing their position.<sup>86</sup>

#### **4.3.2 Nigeria's Corruption Indices**

The landscape of corruption in Nigeria is a nightmare of unbelievable proportions. The statistics are glaringly dismal. Twenty per cent of Nigeria's GDP or about \$149 billion is lost to corruption annually.<sup>87</sup> Between 1960 and 1999, public officials plundered over 220 billion pounds sterling or \$380 billion<sup>88</sup> an amount is six times more than the total amount the USA provided for the reconstruction of post-World War II Europe under the Marshall Plan.<sup>89</sup> Transparency International <sup>90</sup>(TI) has consistently ranked Nigeria

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<sup>85</sup> Transparency International, *The Private Sector*, accessed at <http://www.transparency.org> on 4/10/14 at 1.57pm; Cleen Foundation Monograph Series No. 7, *Corruption and Governance Challenges in Nigeria*, 2010

<sup>86</sup> Asian Development Bank, Anticorruption Policy, Institutional Document, July 1998 accessed on 3/12/14 at 7.51am. <http://www.adb.org/documents/anticorruption-policy>.

<sup>87</sup> *Recovering African Wealth: Deterring Corruption and Financing Development*, 1, Africa Tax Spotlight, 4, 2010 in Cleen Foundation Monograph Series note 379 at 10.

<sup>88</sup> African Abroad (1999) 24 June 1999, Ribadu, N., *Corruption drains Africa of \$140 bn annually*, Punch Nigeria, 2007, [www.efccnigeria.org](http://www.efccnigeria.org); Human Rights Watch (HRW) (2007). "Chop Fine", [www.hrw.org](http://www.hrw.org) both reproduced in Obuah, E., *Combating Corruption in a "Failed" State: The Nigerian Economic and Financial Crimes Commission (EFCC)*, Journal of Sustainable Development in Africa (Volume 12, No.1, 2010).

<sup>89</sup> Ibid.

very low in its annual global corruption indices: in 2006, Nigeria was ranked 146 out of 163 with a 2.2 corruption perception index (CPI) score while in 2007, it was ranked 148 with a 2.2 score. According to TI, the low scores in the CPI is an indication that public institutions are deeply compromised.

Furthermore, TI noted that more than 50% of bribes were directly asked for while 60% were offered to avoid problems with authorities. The most recent Rankings (Corruption Perceptions Index 2013) places Nigeria at 144<sup>th</sup> position out of 177 countries monitored scoring a meagre 25% out of 100. In 2001 alone, TI documented that Nigeria lost more than N23 billion to corruption.<sup>91</sup> More than 40% of Nigerians interviewed indicated that they had offered a bribe to obtain access to a service they were ordinarily entitled to free of charge. Significantly, all the global surveys in the past 18 years in which Nigeria featured had her at the lowest rank in corruption indices.<sup>92</sup>

From the depth of its pervasiveness and its audacity, it would appear that corruption has been legalised in Nigeria.<sup>93</sup> It is both endemic and systemic<sup>94</sup> permeating all the nooks and crannies of the country, infecting, polluting and affecting the three arms of the democratic governance structure, corroding the institutions responsible for the implementation and enforcement of laws and regulations. Corruption has turned Nigeria into a paradox: with so many endowments yet very little to show for it by way of socio-economic development as more than 60% of its population live below the poverty level.<sup>95</sup>

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<sup>90</sup> Transparency International (TI), a Berlin-based nonprofit, non-governmental organization established in 1993 with one vision: a world in which government, business, civil society and the daily lives of people are free of corruption.

<sup>91</sup>Salul, H. A. and Aremu, F. A., *A Critical Analysis of the Anti-Corruption Crusade in Nigeria*, 2004, Political Review, 3, 5.

<sup>92</sup>Ajie and Wokekoro, note 82 at 98.

<sup>93</sup>Gire, J.T., *A Psychological Analysis of Corruption in Nigeria*, Journal of Sustainable Development in Africa Vol 1 No. 2, Summer 1999 in Ajie, H. A. and Wokekoro, note 82 at 98 – 99.

<sup>94</sup>Ajie and Wokekoro, note 82 at 98.

<sup>95</sup>Moghalu, note 8 at 77.

#### 4.3.2.1 *Consequences of Corruption*

How does corruption negatively affect the developmental process of a nation? Are there any linkages between it and economic development and the vitality of IRAs?

The misappropriation and corrupt handling of public funds for private or unintended uses has a clear and direct effect on the amount of finances available for government to channel for developmental projects and services. Secondly, corruption inhibits the ability of governments to regulate the market effectively thus giving room for distortions in the market place and further polluting the decision-making processes of government officials. Thirdly, its distributive effect is very negative as it is inherently disadvantageous to the poor, thus increasing inequality by limiting access to beneficial government activities to an already privileged group.<sup>96</sup>

On a contemporary level, another set of consequences have been receiving attention from the global anti-corruption watchdog – Transparency International (TI). TI states that “in low-income countries, rampant corruption jeopardises the global fight against poverty, threatening to derail the United Nations Millennium Development Goals.”<sup>97</sup> As an example, countries that are corruption-prone have higher levels of maternal mortality and lower levels of education.<sup>98</sup>

Given its pervasiveness and impact on law enforcement and other institutions, that has in turn undermined their capacity to support the IRAs in their enforcement mandate, this thesis will focus on some of the key agencies established primarily to tackle the menace and how they have fared. They include the Economic and Financial Crimes Commission (EFCC), the Independent Corrupt Practises and Other related Offences Commission (ICPC), as well as the Police.

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<sup>96</sup>You, J.S., and Khagram, S., *A Comparative Study in Inequality and Corruption*, 70:1 American Sociological Review, 2005, 136-57.

<sup>97</sup>Trebilcock M.J., and Prado, M.M., *An Advanced Introduction to Law and Development*, Elgar Advanced Introductions, 2014, Edward Elgar Publishing Limited, INC, USA at 154.

<sup>98</sup>Garson, P., *Push to Tackle Corruption in Post-2015 Agenda*, 4 October 2013 in Trebilcock and Prado Ibid, at 154.

### 4.3.3 The Economic and Financial Crimes Commission (EFCC)

At its establishment in 2004, the EFCC took the hydra-headed monster of corruption ravaging the country head-on. The initial zeal achieved some measure of success in the investigation, arrest and obtaining of some convictions in corruption cases.<sup>99</sup>

Sadly, the momentum did not last and four years down the line, TI rankings showed a very disappointing performance in spite of the work of the anti-corruption agencies.<sup>100</sup> As a result, Nigeria began another downward slide in the international rankings on its prosecution of the war against corruption.<sup>101</sup>

The loss of momentum and the slide into under-performance by the EFCC was a result of several factors that to date continue to weigh down the effectiveness of the Commission. These include the willingness of the leadership of the Commission to lend itself as a tool in the hands of the incumbent government to persecute perceived opposition members, thus undermining its impartiality through selective investigations; a lack of independent funding streams; and ill-trained and ill-motivated staff, among others.<sup>102</sup>

### 4.3.4 The Independent Corrupt Practises Commission (ICPC)

The rationale behind the setting up of the ICPC was not different from that of EFCC as it was to complement the latter. According to Akanbi, the ICPC emerged as a policy

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<sup>99</sup> The Commission between May 2003 and June 2004 recovered money and assets derived from crime worth over \$700 million. It also recovered another £3 million from the British Government. It has curbed oil bunkering in the Niger Delta Region. The initial daily illegal bunkering of about 300,000 - 500,000 barrels has now substantially reduced to less than 50 thousand barrels. In addition they have arrested over 500 Advance fee fraud kingpins: Source: Being a paper presented at the Adamawa Economic Conference and Financial Exhibition, December 9-10, 2004 by Nuhu Ribadu.

<sup>100</sup> Nwagwu, E.J., *An Appraisal Of Economic And Financial Crimes Commission (EFCC) And The War Against Corruption In Nigeria (1999 – 2007)*, International Journal of Research in Arts and Social Sciences (IJRASS), <http://www.academicexcellencesociety.com>; US annual Humans Rights reports indicated that the EFCC did not perform well: <http://internationalreporter.com/News-5335/africa-corruption-rating-nigeria-s-worsens.html> 2009. In 2010, London Metropolitan Police severed its relationship with the EFCC on account of low performance; British's Serious Organized Crimes Agency (SOCA) has reviewed its partnership with EFCC on poor performance.

<sup>101</sup> In 2004 Nigeria ranked 144, 146 in 2006, 148 in 2007 and slide to 144 in 2013: Source – Transparency International, <http://www.transparency.org>.

<sup>102</sup> Nigeria Watch Newspaper, Monday 6 October 2014; Report on BenchMarking Ant Corruption Initiatives in Africa, The African Institute of Corporate Citizenship (AICC), [http://www.baacafrika.org/m/files/fs/aicc\\_anticorruption\\_report\\_en.pdf](http://www.baacafrika.org/m/files/fs/aicc_anticorruption_report_en.pdf); Nwagwu, note 100.

response from the government to fight and curb corruption that had assumed monstrous proportions, and permeating all levels of the society and corroding its moral economic fabric, thus threatening its stability.<sup>103</sup> The Commission launched ground-breaking initiatives meant to tackle corruption in the public service.<sup>104</sup> Sadly, the euphoria and initial bravado evaporated within two years as virtually all of the cases it had brought to court became politicised and stalled. Thus, even though the ICPC displayed the intent to prosecute, it appears the “Nigerian factor”<sup>105</sup> and the decay in the judiciary limited its progress.<sup>106</sup>

In addition, the performance of the ICPC was hampered by the perception in the eyes of the public that it was set up to weaken and distract the earlier anti-corruption body (the EFCC) which appeared at the beginning of its life to be vigorously fighting corruption. ICPC's manner of operations did not help matters as the depth and professionalism of its investigations and the filing of charges were called into question amidst allegations of underhand dealings, extortion, a lack of transparency and probity among its officer corps.<sup>107</sup>

The dismal performance of the anti-corruption agencies<sup>108</sup> in curtailing corruption has reinforced the deficiency that the IRA model suffers from as these law enforcement agencies are by design primed to assist the IRAs in their enforcement mandate.

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<sup>103</sup>Akanbi, M., 2005 in Raimi, L., et al, *Role of Economic and Financial Crimes Commission (EFCC) and Independent Corrupt Practices & Other Related Offences Commission (ICPC) at Ensuring Accountability and Corporate Governance in Nigeria*, Journal of Business Administration and Education, Volume 3, Number 2, 2013, 105-122.

<sup>104</sup> ICPC's official website, available at <http://www.icpcnigeria.com>; This Day, Lagos. March 28, 2003 at 1.

<sup>105</sup> The Nigerian Factor is an infamous terminology that has bedevilled contemporary Nigeria. It is the notion that anything and everything can happen at any time in this Nigeria: The Sun Newspaper, Nigeria, April 20, 2014.

<sup>106</sup>Enweremadu, D.U., *The struggle against Corruption in Nigeria: the Role of the National Anti-Corruption Commission (ICPC) under the Fourth Republic*, IFRA Special Research Issue Vol. 2 at 41-66; Raimi note 103.

<sup>107</sup>Ibid ; News Watch. Lagos. March 3, 2003 at 28.

<sup>108</sup>Raimi, note 103; Enweremadu, note 106; Nwagwu, note 100.

#### 4.3.5 The Police

The Police Act governs the establishment, control, and management of the Nigeria Police Force.<sup>109</sup> Section 4 states the role of the Police is the prevention and detection of crime, the apprehension of offenders and the preservation of law and order, the protection of life and property and the enforcement of all laws and regulations.<sup>110</sup>

The long years of military rule in Nigeria affected the psyche of the Police. The culture of impunity that is a product of militarisation and the hallmark of military regimes became ingrained in the police as a result. In the above context, the police as an institution transmuted itself from being a body set up for the protection and preservation of the common good of society to one manifesting many negative attributes. The police became a law unto themselves, brutalising, and maiming, killing and detaining persons arbitrarily, thus institutionalising repression<sup>111</sup>, with corruption and extortion becoming their byword.<sup>112</sup> The reputation of the Police took a major battering after emerging as the most corrupt institution in Nigeria in the nation's Corruption Index in 2007.<sup>113</sup> To cap it all, the public, whose protection is the primary responsibility of the police, have come to have a complete lack of trust in them,<sup>114</sup> as typified by the derogatory reference to the fact that the police are not your friend.<sup>115</sup>

No economy develops in the midst of insecurity and the breakdown of law and order. When all of these occur within the background of fragile institutions charged with the maintenance of law and order, it raises major concerns. The deficiencies enumerated above in the institutional frameworks of law enforcement institutions that

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<sup>109</sup> Cap 359, Laws of the Federation of Nigeria, 1990.

<sup>110</sup> Akuul, T., *The Role of The Nigerian Police Force in Maintaining Peace and Security in Nigeria*, Journal of Social Science and Public Policy, Vo.3, March 2011.

<sup>111</sup> Dauda, M., Commenting on the Helpless State of Police when Confronted with Armed Robbers. Tell Magazine May, 2008; Cleen Foundation, Analysis Of Police and Policing In Nigeria, Justice Sector Reform, www.cleen.org at 13.

<sup>112</sup> Alemika, E. E. O. and Chukwuma I.C., Police-Community Violence in Nigeria (Centre for Law Enforcement Education, Lagos and the National Human Rights Commission, Abuja, Nigeria), 2000.

<sup>113</sup> Ajie and Wokekoro, note 82 at 99.

<sup>114</sup> Alemika E. E., *Policing and Perceptions of Police in Nigeria*, 1998, Police Studies 11(4): 161-176.

<sup>115</sup> Ajie and Wokekoro, note 82.

are complementary to IRAs in the fulfilment of their enforcement mandate further reinforce the deficiency that the IRA model suffers.

#### **4.4 Capacity Building Institutions**

Capacity building has been defined as the “development of knowledge, skills and attitudes in individuals and groups of people relevant in design, development, management and maintenance of institutional and operational infrastructures and processes that are locally meaningful.”<sup>116</sup> It includes activities, approaches, strategies, and methodologies which help organisations, groups and individuals to improve their performance; generate development benefits and achieve their objectives over time.<sup>117</sup>

The above definitions highlight the importance of education in providing a platform for the acquisition of the skills that propel innovation and technology, and lift the fortunes of institutions and nations.<sup>118</sup> In addition, Moghalu<sup>119</sup> argues in his book that the face of the global economy has changed from one that was driven in the past by labour, costs, resource endowments, and infrastructure, to one now propelled by patents, innovation, research and development (R&D), and the availability of knowledge workers.<sup>120</sup>

For Nigeria to aspire to be a knowledge-driven economy that is competitive, especially as it relates to the economy and particularly with relevance to IRAs, an array of skills, disciplines, and competencies needs incubating and nurturing. The key is in laboratories (universities, higher institutions, and research institutes) that understand the peculiar complexities of the local environment.

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<sup>116</sup> Definition adopted at the workshop on Capacity Building in Land Administration for Developing Countries, held at ITC, The Netherlands, November 2000 (Groot and van der Molen 2000).

<sup>117</sup> The World Bank, Capacity Building in Africa, An OED Evaluation of World Bank Support, [www.worldbank.org/oed](http://www.worldbank.org/oed) at 6.

<sup>118</sup> Twinney-Kamugisha, E., *Why Africa Fails: The Case for Growth Before Democracy*, Tafelberg, NB Publishers, Cape Town, RSA, [www.tafelberg.com](http://www.tafelberg.com) at 93.

<sup>119</sup> Moghalu, note 8 in Chapter 9.

<sup>120</sup> Ducker, P., Lecture at the Edwin L. Godkin Lecture at Harvard University's Kennedy School of Government in 1994 titled “Knowledge Work and Knowledge Society: The Social Transformations of this Century”.



Furthermore, regulation as a discipline requires a congregation of set skills and competencies in several disciplines and professions to allow an IRA to exist and function optimally. Disciplines such as accounting, law, economics, finance, criminal justice, social sciences, and engineering have to populate an IRA for it to be worth its name.

However, Nigeria's educational system is presently at the crossroads at all levels; be it the primary, secondary, tertiary and university levels or research centres. The problems facing education include the structure of the education system, access, quality, curriculum and funding.<sup>121</sup> Even though the 1999 Constitution provides free, compulsory and universal primary education, free university education and a free adult literacy programme,<sup>122</sup> over 10 million children of primary school age are out of school.<sup>123</sup> There is an acute shortage of qualified teaching staff in Nigerian universities and research institutions.<sup>124</sup> This has led to a decline in the quality of graduates because of obsolete research facilities, especially in the public institutions. In a recent global ranking, no Nigerian university is listed among the world's best 6000 universities. Even among the first 100 universities in Africa, it was unflattering to learn that the leading Nigerian university could only manage the 44th position.<sup>125</sup>

The lack of capacity-building institutions within Nigeria evidences itself in the limited capacity of regulatory IRAs in existence. The challenge of limited capacity occupied much of Lafont's later writings, where he advocated the need for a separate theory explicitly recognising this lack.<sup>126</sup> This lack prevents IRAs from employing suitably qualified staff, a task made even harder by the absence of suitably qualified professionals in fields that strengthen regulatory capacity such as law, accounting,

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<sup>121</sup>Moghalu, note 8.

<sup>122</sup>Section 18 of 1999 Constitution of the Federal Republic of Nigeria.

<sup>123</sup>Moghalu, note 8.

<sup>124</sup> Ibid; Olugbile, S., and Alechenu, J., *More Universities Amidst Poor Facilities in Existing Institutions*, The Punch Newspaper, Nigeria, January 15, 2013.

<sup>125</sup>Oyebode, A., *Positioning Nigeria For The Top 20 Economies - The Role Of Institutions*, paper presented at the 13th Annual Nigerian Economic Summit (NES#13), held at Transcorp Hilton Hotel, Abuja, September 5-7, 2007.

<sup>126</sup> Laffont, J.J., *Regulation and Development*, Cambridge University Press, 2005.

economics, and management. Even though most of the IRAs in existence<sup>127</sup> in Nigeria have copious provisions detailing the intents of financial independence and independent funding streams that could enable them to employ and retain qualified work force, the objective has not been realised. In certain instances, government deliberately withholds funding as a means of undermining and dictating to the IRAs.<sup>128</sup> Pollitt and Stern provide strong evidence to show that there are human resource constraints in developing countries, which limit the scale, scope, and potential effectiveness of electricity and energy regulators. This could well apply to the regulators of other utilities across the board in developing countries.<sup>129</sup>

#### **4.5 Conclusion**

Chapters 3 and 4 have underlined the primacy of institutions to economic growth and their centrality in the effective functioning of the IRA model of regulatory governance. In addition, the chapters paint a picture of the state of these institutions. In the process, the thesis has established that the IRA model is in all probability doomed to fail within the Nigerian context because of intemperate institutional fragilities among its political, economic, law enforcement and supporting institutions. Ten basic considerations support this proposition.

First, the unrelenting weakness and instability of institutional and governance arrangements are hostile to the successful establishment of IRAs. Institutions, though in existence, are fragile and weak. Weak structures need fresh foundations or reinforcement in some cases to be effective. Attempts at forcing them to stand or

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<sup>127</sup> Section 17, Nigerian Communications Act, 2013 and Section 52, of the Electric Power Sector Reform Act, 2005 both have similar provisions detailing independent funding sources outside government sources in order to secure their independence. It is only NCC that has been able to utilize these streams robustly to make themselves independent of government financially.

<sup>128</sup> Wren-Lewis, L., *Regulation of Utilities in Developing Countries*, a Thesis submitted for the degree of D.Phil in Economics, Trinity Term, 2010.

<sup>129</sup> Pollitt, M.G., and Stern J., *Human Resource Constraints for Electricity Regulation in Developing Countries: Has anything Changed?*, EPRG Working Paper, EPRG 0910, Cambridge Working Paper in Economics, CWPE, 0914.

building floors on them or surrounding them with supposedly supporting structures would only weaken and ultimately collapse the main structure.

Two, the nascent nature of these institutions calls for caution in propping them up to fulfil a mandate that they are either inexperienced or too fragile to carry out. Administrative systems in institutions involve complex institutional technologies that require time to evolve. Nigeria is on the threshold of this process and time is required for these administrative mechanisms to take root and thrive. Thrusting the model upon her without mature institutions will not position the country to function effectively in an “adult” global village characterised by globalisation.

Three, the overarching influence of corruption in, within and around the weak and nascent institutions sets them up for failure from the outset. The permeating role of corruption in each of the institutional frameworks corrodes and weakens an already weakened setup. Addressing this scourge in a fundamental way as a first step is the only way of dealing with it from the roots.

Four, the active presence of strong men in power, over and above the place of strong institutions, is contrary to the admonition of President Obama <sup>130</sup> for strong institutions instead of strong men. A strongman straddles the environment in an arbitrary manner, trampling on rights of individuals and restricting them, thereby appropriating the powers of institutions. The long history of military rule raised a nation of strong men, ruling by force thus inadvertently validating an insidious culture of “might is right” in the psyche of the nation. Democratic, political, and economic institutions gave way to a concentration of power into the hands of strong men who rule over a weak state.

Five, the litany of ill -prepared, opportunistic and accidental leaders in the nation's body politic makes a case for a leadership evaluation and adjustments before

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<sup>130</sup> President Barack Obama addressing the Ghanaian Parliament was quoted to state "Africa doesn't need strongmen, it needs strong institutions". BBC News, 11 July 2009 <http://news.bbc.co.uk/2/hi/africa/8145762.stm>.

the IRA model can thrive. Because of the accidental and ill-prepared nature of all of Nigeria's leaders since independence, they have tended to be predatory in their attitudes to governance; riding rough shod over institutions and laws, having risen to power without any template or agenda for sustainable development.

Six, the vesting of overwhelming and lopsided powers in the Presidency has led to a patrimonial society in which narrow considerations come into play outside the confines of organised systems and institutions in statecraft. It has worked to prevent institutions from growing to maturity. Since absolute power flows from one leader, the absolute power wielded by the President has become the hallmark of the Presidency, corrupting all the streams of the democratic tripod, riding over the legislature and polluting the streams of justice in the judicial arm of government.

Seven, the reluctance or unwillingness of the political class to reform, even in the face of manifest distortions of the democratic ideal as contained in the 1999 Constitution, calls for caution in transplanting the IRA just yet. Economic institutions that are necessary for economic growth draw their life, strength, and jurisdictional powers from the political class. No matter how willing the economic players are in reforming their acts, they could only do so within the ring-fenced powers given them by the political class. This incorrigibility of the political class does not leave room for reason to cheer and to expect the ascension of institutional agility.

Eight, the high level of insecurity does not augur well for the existence and growth of institutions, especially given the structural weaknesses of law enforcement institutions. Sub-parts of the federation do not exist as a part of the writ of the union because of insurgency. This breeds uncertainty and private investment shies away from uncertain terrains.

Nine, the abysmal nature of capacity-building institutions that would provide the feedstock of human capital for the institutions is glaringly lacking. Calibrating and galvanising human capital in critical areas and professions provides institutions with continuity, capacity, knowledge, and tools to nurture institutions towards excellence.

The state of education, learning, and research continues to dip with the attendant dearth of qualified professionals to drive institutional growth and innovation.

Ten, the institutional weaknesses in Nigeria's economy and political space have led to one major downside with economic and political implications. The informal economic sector dwarfs the formal sector in Nigeria, standing at 59% of the overall economy. The dominance of informality in the country's economic sphere has led to excessive transaction costs, corruption in areas such as business incorporation, granting of licences and permits, and titles to land. These weaknesses invariably squeeze the minor business people out of the informal economy to the informal sector thereby reducing the jurisdictional space that IRAs would have been regulating had there be formality in place. The result has therefore been that the existing IRAs in Nigeria regulate a depleted market owing to the high levels of informality. Most of the infrastructure sectors are dominated by players on the fringes or outside the regulatory control of IRAs because of this informality.

In Nigeria, the state and quality of institutions critical to the socio-economic well-being of the nation and the proper functioning of IRAs have been synonymous with the sad national experience. Even though there has been repeated talk of Nigeria as a nation of great potential, it has continued to remain a potential, without actually realising it.

The road that the political, economic, legal, supporting, and capacity-building institutions in Nigeria have trodden since independence has been symbolic of the tortuous road the nation state itself has taken. Transplanting a new regulatory model in the form of IRAs into such hard soil calls for nothing short of a miracle for it to thrive and it would be more realistic to deconstruct the likely outcomes of such transplantation to one of certain failure.

In a further bid to explore the viability of IRAs in the Nigerian context, Chapter 5 will seek to counterbalance its essential attributes against the rule of law concept in theory and practice in Nigeria. This will allow for an inquiry into the presence and

effective functioning of a rule of law regime in Nigeria, the kind that would nurture and support the IRA model.

## CHAPTER 5

### RULE OF LAW

#### 5.1 Introduction

Chapters 3 and 4 analysed the state of Nigeria's political, economic and other supporting institutions, their limitations, and how these impact negatively on the prospects for success of the IRA model in Nigeria. In addition to the institutional deficits, IRAs require an environment where the rule of law prevails. Given the need for the enforcement of property and contract rights under the law before an arbiter that is independent of the other arms of government and other players in the value chain, the observance of the rule of law is essential. This chapter will weigh the conceptual attributes of rule of law concept against what is in practice in Nigeria. This will allow for an inquiry into whether the Nigerian state of affairs can nurture the IRA model.

#### 5.2 Theoretical Framework

Professor A. V. Dicey is credited with the first attempt at a precise delineation of the contours of the rule of law concept in his lecture on English Law at the University of Oxford in 1885.<sup>1</sup> Dicey framed the concept into three essential elements. First, the absolute supremacy of regular law as against the influence of arbitrary or discretionary powers on the part of government: "Englishmen are ruled by the law and the law alone; a man may with us be punished for the breach of the law but he can be punished for nothing else." Second, equality before the law, or the equal subjection of all classes of persons to the ordinary law of the land administered by the ordinary law courts: this means that any person irrespective of status in life or circumstances of birth is subject to the ordinary law of the land. Third, individual rights must be respected.<sup>2</sup>

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<sup>1</sup> Dicey, A.V., *The Law of the Constitution*, (10th Ed.), London: Macmillan Press at 186.

<sup>2</sup> Ibid.

Other scholars<sup>3</sup> agree with Dicey's formulation, summarising it to mean equality before the law, pronouncing the law to be no respecter of anyone or any institution and that governance must be in accordance with the law and not by the whims and caprices of any person. In the immortal words of Montesquieu, "law should be like death, which spares no one."<sup>4</sup>

From these humble postulations, the rule of law concept became a universal concept; acknowledged, recommended and insisted upon by nations, international bodies, and organisations. The United Nations sees the promotion of the rule of law to be at the heart of its global mission. The concept is embedded in the Charter of the United Nations.<sup>5</sup> In addition, the International Commission of Jurists along with the World Justice Project have, on at least three occasions, emphasised the importance of the concept, urging nations to follow its essential characteristics.<sup>6</sup>

### **5.2.1 Linkages between the Rule of Law and Economic Development**

The primary link between the rule of law and economic development is through its impact on the system of private property and its enforcement. The confidence that comes from the knowledge that one can possess and enjoy without hindrance, undue or arbitrary abridgment, the fruit of one's labours incentivises the owner towards innovation and wealth gathering. The rule of law ensures that this right exists and is secured.

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<sup>3</sup> Goodhart, A., *The Rule of Law and Absolute Sovereignty*, in Nwoke, F.C., *The Rule of Law and Constitutionalism in Nigeria in Rule of Law and Good Governance*, eds, Azinge, E. and Owasanoye, B., Nigerian Institute of Advanced Legal Studies, 2009 at 4; De Smith; *Constitutional and Administrative Law*, 3rd Edition, Penguin, London, 1978 at 35; Wade in Akanbi, M.M., *Rule of Law in Nigeria*, Journal of Law, Policy and Globalisation, Vol. 3, 2012; Ojo, A., *Constitutional Law and Military Rule in Nigeria*, Ibadan: Evans Publishers, 1987 at 241; The Proclamations, (1610) 77 ER 1352.

<sup>4</sup> Montesquieu, B., *The Spirit of the Laws*, 1748, ed., Anne M. Cohler, Basis Carolyn Miller and Harold Samuel Stone, *Cambridge Texts in the History of Political Thought*, Cambridge UP, 1989.

<sup>5</sup> Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616) accessed on 7/11/14 at 8.45am from <http://www.un.org/en/ruleoflaw/>.

<sup>6</sup> Athens Conference of 1955; Lagos Conference of the Commission of 1965; and Delhi Conference in Akanbi, note 3; World Justice Project, <http://worldjusticeproject.org/what-rule-law>.



The rule of law, even though an old legal concept, became a catch-phrase in the world of economics only recently. It became a major fascination for economists in the 1980s because of the crumbling of the “Washington Consensus” theory which held that the best way for countries to grow their economies was to get the policies right. In a bid to identify the reasons for the invalidation of the earlier theory, economists concluded that getting the institutional frameworks right, with the rule of law at their centre, was the way out of the quagmire. They reasoned that if the rules of the game were not in order, no amount of tinkering with macroeconomic policy would produce the desired results.<sup>7</sup>

Proponents of the view that the rule of law or law generally has a positive impact on development have in the recent past drowned out the voices of dissent through what Trebilcock and Prado refer to as “extremely bold claims about the potential impact of legal reforms.”<sup>8</sup> As an example, De Soto, in his book, *The Other Path* opines that the nature of the legal system explains the disparities in development between industrialised nations and the others and considers the “law is the most useful and deliberate instrument of change available to man”.<sup>9</sup>

Nobel Prize winning economist Stiglitz, in *The Price of Inequality*, explains the interface between the rule of law and economic prosperity.<sup>10</sup> To him, in every society, what one person does may harm, or benefit, others. This is what economists refer to as the effect of externalities. When those who injure others do not have to bear the due consequences of their actions, they will have inadequate incentives not to injure them, and may not take precautions to avoid the attendant risks of injury, bearing in mind the lack of consequences. Thus, what the rule of law does is to have a series of laws and

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<sup>7</sup> The Economist, *Order in the Jungle*, Mar 13th 2008.

<sup>8</sup> Trebilcock M.J., and Prado, M.M., *An Advanced Introduction to Law and Development*, Elgar Advanced Introductions, 2014, Edward Elgar Publishing Limited, INC, USA at 47.

<sup>9</sup> De Soto, H.H., *The Other Path: The invisible Revolution in the Third World*, New York, NY:Basic Books, 1989 at 185 and 187 in Trebilcock M.J., and Prado, M.M., *An Advanced Introduction to Law and Development*, Elgar Advanced Introductions, 2014, Edward Elgar Publishing Limited, INC, USA at 48.

<sup>10</sup> Stiglitz, J.E., *The Price of Inequality*, Penguin Books, 2013, London at 235-236.

regulations to provide incentives for everyone to avoid injuries to others, be it to their person, property, health and the public goods that they enjoy.

With the above background, the link between the rule of law and IRAs becomes clear and is brought to the fore in the following ways.

For regulation through IRAs to thrive, certainty in law and its enforcement in a given legal and regulatory framework is required. When absent, long term planning and the accompanying investments are inhibited. Where sole discretion rules, investors, rather than looking at the predetermined rules in place for investment, look to the mindset, likely thought processes and nuances of the leader as a barometer whether to invest or not. Pre-set rules, undergirded by a rule of law regime for governing people in such a way that their private property is adequately protected, invariably has a strong influence on peoples' investment decisions and promotes overall economic growth.

Rule of law forms the bedrock of the capacity of a nation to enforce contracts. Without a virile contract enforcement regime, IRAs cannot exist or be effective. The ability to make and enforce contracts and resolve disputes is fundamentally linked to the optimal functioning of markets. All entrants into regulated infrastructures must be able to see the IRA as possessing a predictable arsenal to prescribe the rules and see to their enforcement without external interventions and influences. Good enforcement procedures enhance predictability in commercial transactions and reduce uncertainty by assuring investors that their contractual rights will be upheld.

When laws, rules and procedures, encapsulated under a nation's rule of law regime for enforcing commercial transactions, are bureaucratic and cumbersome or when contractual disputes cannot be resolved in a timely and cost-effective manner, economies rely on less efficient commercial practices. This in turn, weakens and undermines the legitimacy and effectiveness of IRAs. The combined effect then dampens economic growth. Traders turn to personal and family contacts; banks reduce the amount of lending because they cannot be assured of the ability to collect debts or obtain control of property pledged as collateral to secure loans; and transactions tend to

be conducted on a cash-only basis. This limits the funding available for business expansion and slows down trade, investment, economic growth, and development.<sup>11</sup>

The absence of the rule of law within an economic setting has a negative impact on the functioning of an economy as it shrinks instead of increasing it. IRAs serve as a stimulant to private sector entry and participation in infrastructure provision and services as a result of the assurances they offer by way of cost recovery with profits. Where there is a weak rule of law regime, it limits private sector participation as the assurance given by the existence of IRAs is missing.

Furthermore, the existence of IRAs where the rule of law does exist serves as a regulator of state power<sup>12</sup>, arbitrating, balancing, checking and controlling the different manifestations of power within the political system. Law then serves as an umpire, working to ensure that every arm of government keeps within the limits of its jurisdiction and none over-reaches its role at the expense of the other. This role is undertaken by IRAs that already possess powers to act within their delegated legal and regulatory framework.

In conclusion, IRAs operating within the framework of a rule of law regime form perhaps, the most essential of the tools needed in achieving economic prosperity. Given that they too cohabit to secure and protect investments, and ensure the efficient workings of the market exchange system, thus ensuring productivity.<sup>13</sup> In a sense therefore, they act as twins to deliver economic prosperity in a nation's economic setting.

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<sup>11</sup> OECD Toolkit, Contract enforcement and dispute resolution, <http://www.oecd.org/investment/toolkit/policyareas/investmentpolicy/contractenforcementanddisputeresolution.htm>.

<sup>12</sup> Corder, H., *Prisoner, Partisan and Patriarch: Transforming the Law in South Africa, 1985- 2000*, 118 S. African L.J. 772 2001 at 776.

<sup>13</sup> Ibid.

## 5.2.2 Rule of Law, Economic Development and China: A Case Study in Contradictions which Proves the Point

With the conclusion above that the presence and effective functioning of a rule of law regime is a prerequisite for economic growth, how and where can China be placed? China is the fastest growing economy in the world predicted to surpass the size of the U.S. economy in the second decade of this century, emerging as the largest in the world.<sup>14</sup> It has already overtaken Japan as the second largest economy in 2011. China has over \$3.2 trillion in foreign reserves, making it the country with the highest levels of foreign reserves in the world.<sup>15</sup> In spite of this rosy economic picture, adherence to the rule of law very weak and mimics, at best, the globally established benchmarks for the concept.<sup>16</sup>

One group of scholars, Allen, Qian and Qian reached the conclusion that the economic growth indices of China is a counter-example to the findings in the literature on law, institutions, finance, and growth that institutions (including the rule of law) matter to development.<sup>17</sup>

On the opposite side of the table are scholars who caution against the trend of predicting that the Chinese economy is booming and on its way to developed country economic status. Leading this group is Kenneth Dam<sup>18</sup> at the Law School and the University of Chicago. Others include the World Bank<sup>19</sup>, Cooper,<sup>20</sup> Wolf,<sup>21</sup> Young<sup>22</sup> and

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<sup>14</sup> Dam, K., *China As a Test Case: Is the Rule of Law Essential for Economic Growth?* John M. Olim Law and Economics Working Paper No. 275, 2D Series, January 2006.

<sup>15</sup> Moghalu, C.K., *Emerging Africa, How the Global Economy of the 'Last Frontier' can prosper and matter*, Penguin Books, London, 2014 at 353.

<sup>16</sup> Peerenboom, R., *China's Long March toward Rule of Law*, Cambridge University Press, 2002; Trebilcock M.J., and Prado, M.M., *An Advanced Introduction to Law and Development*, Elgar Advanced Introductions, 2014, Edward Elgar Publishing Limited, INC, USA.

<sup>17</sup> Allen, F., et al, *Law, Finance and Economic Growth in China*, Financial Institutions Centre Working Paper 01-44.

<sup>18</sup> Dam, note 14.

<sup>19</sup> Statement of Albert Keidel. In Transcript of an IMF Economic Forum, China In The Global Economy: Prospects and Challenges. Washington D.C. October 19, 2004. Available at (<http://www.imf.org/external/np/tr/2004/tr041019.htm>).

<sup>20</sup> Statement of Richard N. Cooper, Mauritis C. Boas Professor of Economics, Harvard University. In Compilation of Hearings Held Before the U.S.-China Security Review Commission. 107th Congress, First and Second Sessions. p. 788 (2002).

the Organisation of Economic Cooperation and Development. (OECD).<sup>23</sup> The basis of the caution rests on two arguments:

Firstly, the scholars posit that an analysis of the data supplied by the Chinese government and sourced alternatively by the World Bank shows that the Chinese economy is not doing well in terms of per capita income. When compared with the economies of other developing countries that are considered behind China in developmental indices, such as Mexico, South Korea, Taiwan, China's per capita income performance is abysmally low.<sup>24</sup> This invariably leads to the conclusion that the performance of the Chinese economy is exaggerated.

Secondly, the scholars point to a 1994 World Bank Report<sup>25</sup> which indicates inherently unreliable data recording that China uses that tend to show a picture in favour of growth.<sup>26</sup>

On a close consideration of these two opposing viewpoints, this thesis argues that the central role played by the rule of law regime in a nation's economic fortunes cannot be downplayed as unimportant in the context of China. Three reasons support this position:

First, private capital abhors uncertainty in the market place.<sup>27</sup> Unlike the public sector that invests without consideration of recovery of investments, the private sector

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<sup>21</sup> Wolf, M., *China Has Further to Grow to Catch Up with the World*, Financial Times. April 13, 2005 at 19.

<sup>22</sup> Young, A., *Gold into Base Metals: Productivity Growth in the People's Republic of China during the Reform Period*, 2003, *Journal of Political Economy* 111(6): 1220-1261.

<sup>23</sup> Organization for Economic Cooperation and Development, 2005b, *Governance in China*. Paris. OECD.

<sup>24</sup> Dam, note 14.

<sup>25</sup> World Bank, 1994. China: GNP per Capita. Report No. 13580-CHA. December 15, 1994 at v.

<sup>26</sup> World Bank, 1994. China: GNP per Capita. Report No. 13580-CHA. December 15, 1994 at v-vi; Statement of Richard N. Cooper, Mauritis C. Boas Professor of Economics, Harvard University in Compilation of Hearings Held Before the U.S.-China Security Review Commission. 107th Congress, First and Second Sessions at 788 (2002).

invests with the aim of recovering its investment in addition to a return thereon in profits. Thus, an investment climate like the Chinese one that does not offer credible commitments, guarantees, or assurances that investments will be recoverable through an effective rule of law regime, would not be sustainable from a private sector viewpoint.

Second, Dam posits that China recognises the importance of the rule of law to sustainable economic development. What the government has been doing is what Dam refers to as “feeling their way for stones on the way across the river to development”<sup>28</sup> noting that political, ideological, and especially bureaucratic obstacles had to be overcome, circumvented, or sometimes perhaps simply out-waited before reforms could take place.

Third, a recent work that reviewed the economic history of a number of developing countries revealed two relevant conclusions that affect the relevance of the rule of law regime in the case of China. While igniting economic growth does not necessarily require extensive institutional reform, sustaining growth after it is stimulated requires stronger institutions. This appears to be where China stands now in history.<sup>29</sup> When China commenced economic reforms towards private sector participation, they did not need the faithful implementation of the rule of law tenets. However, now that there is the need for sustainability, China needs the rule of law.<sup>30</sup>

Having concluded that rule of law is essential to the economic well-being of every nation; this thesis will now examine the application of the rule of law concept in Nigeria episodically between the military and civil administration eras.

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<sup>27</sup> Bloomberg, February 11, 2009,

<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aqniLw1uyhDI&refer=home>.

<sup>28</sup> Shirk, S.L. *The Political Logic of Economic Reform in China*, 1993, Berkeley and Los Angeles: University of California Press; Baum, R., *Burying Mao: Chinese Politics in the Age of Deng Xiaoping*, 1994, Princeton: Princeton University Press.

<sup>29</sup> Rodrik, D., *Growth Strategies*, Working Paper 10050, 2003, National Bureau of Economic Research

<sup>30</sup> Raulli, D., *Why is the Rule of Law in China Unsuccessful?*, The Holodomor, <https://www.hamilton.edu/levitt/insights...journal/danielle-raulli-article>.

### 5.3 The Rule of Law under Military Regimes

The military have ruled Nigeria for just over half of its life as an independent nation. How has the concept of the rule of law fared during these periods, in the light of its central role in the existence and functioning of the IRA model of regulatory governance?

Even though there have been seven different military regimes headed by eight heads of state, our consideration of these regimes will be under one heading. This is because all the military regimes share commonalities. These include the mode of assumption of power, the method of acquiring legitimacy, the instruments employed to rule, and the outcomes of the regimes by way of their impact on governance and development.

This thesis adopts as a guide the principles underlying the nine factors developed by the World Justice Project (WJP)<sup>31</sup> out of the WJP Rule of Law Index, which measures how the rule of law is experienced by ordinary people in 99 countries around the globe. These principles are Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, Criminal Justice, and Informal Justice.

#### 5.3.1 Governance Modus Operandi

All the military regimes assumed power through the instrument of force, or in the words of Akanbi “through the barrel of the gun as against the ballot box.”<sup>32</sup> They took over the reins of power by virtue of the monopoly on legitimate violence<sup>33</sup> or superiority of the coercive instruments available to them. They did not seek the

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<sup>31</sup> World Justice Project, note 6.

<sup>32</sup> Akanbi, note 3 at 3.

<sup>33</sup> Weber, M, *Politics as a Vocation*, 1946, in From Max Weber: Essays in Sociology, translated and edited by H.H. Gerth and C. Wright Mills, New York: Oxford University Press. The monopoly on legitimate violence theory is the definition of the state expounded by Max Weber in *Politics as a Vocation*, which has been predominant in philosophy of law and political philosophy in the twentieth century. It defines a single entity, the state, exercising authority on violence over a given territory, as territory was also deemed by Weber to be a characteristic of state. Importantly, such a monopoly must occur via a process of legitimating, wherein a claim is laid to legitimise the state's use of violence.

mandate of the governed before taking over power. That established, it could be said that they possessed no popular mandate, nor were they answerable to anyone but themselves.

On assuming power, all the military regimes exhibited similar characteristics that lent themselves to the same legal and constitutional interrogation. The architecture of the regimes all bore distinctive features that included usurpation of Constitutionalism and legality, abridgement of separation of powers doctrine, ouster clauses, fundamental human rights infringements, ouster clauses, creation of special courts and tribunals, reign of discretion; closed system of government, retroactivity of laws, and personification of law by the military rulers.

### **5.3.2 Usurpation of Constitutionalism and Legality**

Even though the military regimes took over power through channels not recognized by law, each as a very first step sought to acquire legitimacy through legality. They did this by pledging at the altar of the rule of law that the affairs of government would be conducted within the confines of the law. They all proclaimed the rule of law as the cornerstone of their administrations.<sup>34</sup> For example, the Buhari/Idiagbon military regime (1984 - 1985), thought to be the most brutal of military regimes Nigeria has known, gave a welcome embrace to the rule of law when it took over power. The regime's second in command was quoted to have said "... stable government is absolutely impossible anywhere in the world if the governed are denied their rights and they have nowhere else to seek redress."<sup>35</sup>

As if on cue, the next steps taken by each of the military regimes were the suspension, modification and the re-enacting of the Constitution as a military decree, thus supplanting it with a caricature that contained a set of "allowed" rights and subordinating the whole document to the whims and caprices of the military regime.<sup>36</sup>

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<sup>34</sup> Agbaje, F., *The Rule of Law and the Third Republic*, In *Fundamental Legal Issues in Nigeria*, 1995, N.L.R.ED. P Series No. 1), 45.

<sup>35</sup> Ibid.

<sup>36</sup> Mowoe, K.M., *Constitutional Law in Nigeria*, Malthouse Press Limited, 2008.



For example, in the first military intervention, the Constitution (Suspension and Modification) Decree No 1 of 1966 did three things in one fell swoop: it suspended the 1963 Constitution, modified it, and then re-enacted it. All the subsequent military regimes took that route to gain legality and legitimacy.<sup>37</sup>

The Republican Constitution of 1963 was the supreme law of the land prior to January 16th, 1966. It had the ultimate stamp of authority because it was superior to any other law and binding on all authorities and persons.<sup>38</sup> In spite of this clear stamp of authority and finality, when the military took over power in 1966, some parts of the 1963 Republican Constitution were either suspended or modified by the Constitution (Suspension and Modification) Decree No. 1 1966. The Decree became the supreme law of the land and overrode every piece of legislation which was inconsistent with it, including the Constitution. Decree No. 1 of 1966 had some important provisions, among which a provision that subordinated all the unsuspended parts of the Constitutions to the military decree: “Provided that this Constitution (the Federal Constitution, 1963) shall not prevail over a Decree, and nothing in this Constitution shall render any provision of a Decree void to any extent whatsoever.”<sup>39</sup>

The above provision which was replicated in all the subsequent military regimes’ decrees was ironic: even though their assumption of power was through an illegitimate and unlawful path, they all sought to be on the right side of the rule of law.

### **5.3.3 Abridgement of Separation of Powers Doctrine**

History has repeatedly shown that unlimited power in the hands of one person or group in most cases leads to the suppression or curtailment of the rights of others. The

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<sup>37</sup> Bello, A.A., *Kelson and the Theory of Revolutions: A Look at the Legality of Military Administrations in Nigeria*, 2008, Available at SSRN: <http://ssrn.com/abstract=1121322> or <http://dx.doi.org/10.2139/ssrn.1121322>.

<sup>38</sup> Section 1.

<sup>39</sup> Section 1(2).

separation of powers doctrine in a democracy aims to prevent abuse of power and to safeguard freedom for all.<sup>40</sup>

The first casualty of military rule has always been the separation of powers concept, in the fusion of law making and execution powers into one arm of government. On assumption of power, each of the military regimes collapsed law making and executive functions into one entity which they superintended at both the Federal and State levels. At the Federal level, military ruling authorities appropriated to themselves the dual roles of legislation and execution. Unlike in a democratic setting, where laws go through a legislative process anchored by the legislative arm and culminate in the executive giving assent to it to become law, the process is truncated by fusing the two roles into one and domiciling it in the military ruling body. With this, the robustness of a law-making process that ensures citizen participation, consultation, and input is short-circuited and the separation of powers doctrine subverted.

#### **5.3.4           Infringement of Fundamental Human Rights**

The United Nations has described human rights as “those rights which are inherent in our nature and without which we cannot function as human beings.”<sup>41</sup> All the past Constitutions since independence have embedded the array of rights contained in the present Constitution.<sup>42</sup> These rights include the rights to life, dignity of human person, personal liberty, fair hearing, and private and family life. Others include the rights to freedom of thought, conscience and religion, freedom of expression and the press, right to peaceful assembly and association, freedom of movement, freedom from discrimination; the right to acquire and own immovable property.

Enforcement of human rights in the several military regimes indicates that while one category of rights was left intact and only marginally affected, the second category

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<sup>40</sup> Montesquieu, note 4 Chapter 6.

<sup>41</sup> Atsenuwa, A., et al, *Human Rights Made Easy*, Third Edition, 1999, Legal Research and Resource Development Centre, Lagos at 6.

<sup>42</sup> Sections 33 to 44 of the 1999 Constitution of the Federal Republic of Nigeria.

were tampered with by the military regimes.<sup>43</sup> Rights relating to life; human dignity; private and family life; freedom from discrimination and compensation for compulsory acquisition of property belong to the first category. The second category of rights was of necessity abridged by the military regimes considering the manner in which force was used to acquire power. These included rights to personal liberty; a fair hearing; freedom of expression; peaceful assembly; freedom of association and the right to free movement.<sup>44</sup>

### 5.3.5 Ouster Clauses

Even though throughout the duration of the military foray into political governance, the judiciary was retained as a separate arm of government, its jurisdiction was curtailed by ouster clauses that were inserted in all decrees. An ouster clause is a provision in a law that limits or takes away the jurisdiction of a competent court of law. It robs the court of the power to inquire into matters brought before it.<sup>45</sup> An example of the wording of an ouster clause is contained in Section 5 of Decree No. 17 of 1985, which is in *pari materia* with other military decrees on ouster clauses: “No question as to the validity of this or any other Decree or any Edict shall be entertained in any court of law in Nigeria.”<sup>46</sup>

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<sup>43</sup> Ojo, E.O., *Human Rights and Sustainable Democracy in Nigeria (1999 - 2003)*, J. Soc. Sci., 13(1): 15-29 (2006).

<sup>44</sup> Williams, F.R.A., *Fundamental Human Rights under a Military Government*, being the text of a lecture delivered at Ogun State University, Ago Iwoye under the auspices of the University's Special Guest Lecture Series on July 11, 1985.

<sup>45</sup> Sambo, A.O, and Abdukadir, A., *Ouster Clauses, Judicial Review and Good Governance: An Expository Study of the Experience in Nigeria and Malaysia*, OIDA International Conference on Sustainable Development, 2012, Conference Centre, Montclair State University Montclair, New Jersey, USA, July 31 – August 02.

<sup>46</sup> Examples of some of the decrees made that had ouster clauses include Constitution (Suspension and Modification) Act, Cap 64, Laws of the Federation of Nigeria (LFN), 1990, which was not abrogated before the promulgation of Decree No. 107 of 1997 of 1993 whose provisions are similar to it; Civil Disturbances (Special Tribunal) Act, Cap 53, LFN, 1990; Armed Forces (Disciplinary Proceedings) Act, Cap 22 LFN, 1990; The Civil Service Commission and other Statutory Bodies (Removal of Certain Persons from Office) Act, Cap 54, LFN, 1990; Currency Conversion (Freezing Orders) Act, Cap 82, LFN 1990; Forfeiture of Assets etc (Validation) Act, Cap 158, LFN, 1990; The Special Tribunal (Miscellaneous Offences) Act, Cap 410, LFN, 1990; The State Security (Detention of Persons) Act, Cap 414, LFN, 1990; Public Officers (Forfeiture of Assets) Decree No 8 of 1991; The Association of Individuals (Dissolution and Proscription etc) Decree No 21 of 1992; The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1994; The Federal Military Government (Supremacy and Enforcement of Powers) Decree No 28 of 1970 , among others.

Even though a large section of the judiciary resigned itself to its fate on the mere mention of an ouster clause in a decree by being “executive minded”<sup>47</sup>, there were some judges who thought otherwise.

On several occasions, some courts<sup>48</sup> rose stoutly to inquire into ouster clauses in decrees in order to maintain its sacred role under the separation of powers concept. One such occasion was the decision of the then Chief Justice of the Federation to strike down an ouster clause in a decree, by relying on the separation of powers concept:

We must here revert again to the Separation of Powers which the learned Attorney General himself did not dispute is still the structure of our system of government. In the absence of anything to the contrary, it has to be admitted that the structure of our constitution is based on the structure of power, the legislation, the executive and the judiciary. Our constitutions clearly follow the model of the American Constitution.<sup>49</sup>

Even though the Military Government responded by promulgating yet another decree that expressly nullified the decision of the court in that case, the point had been made that the judiciary would not sit by and allow the separation of power doctrine to go to waste without a fight. This point was further reinforced by Justice Acholonu’s insistence that treating ouster clauses as “though they were stipulation from God will not help in the development of jurisprudence.”<sup>50</sup> The negative effects of ouster clauses included inhibiting the right of access to the court to procure justice. These clauses existed in virtually all the military decrees and went a long way to weaken the role of the judiciary as a distinct arm of government.<sup>51</sup>

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<sup>47</sup> Corder, note 12 at 776.

<sup>48</sup> *Lakanmi and others v The A.G. (WEST) & 2 others*, 6 Nigerian Supreme Court Cases, 1970: 143); *Jackson V Gowon & ors* (1967) 8 Nig Bar J.87; *The Council of the University of Ibadan V Adamoleku* (1967) 1 All N.L.R. 213; *Lakanmi & Anor. V Attorney-General (West) & Ors* (1971) 1 All N.L.R. (Part 11) 201; *Governor of Oyo State and Others v Oba Ololade Folayan* (1995) 9SCNJ 50. at 80.

<sup>49</sup> Ademola, A. CJN, in *Lakanmi and others v The A.G. (WEST) & 2 others*((6 Nigerian Supreme Court Cases, 1970: 143).

<sup>50</sup> Acholonu, P., in *Akanbi* note 3 at 5.

<sup>51</sup> *Ibid.*

### 5.3.6 Creation of Special Courts and Tribunals

One of the features of the rule of law is the subordination of all disputes to adjudication in normal or regular courts established for that purpose.<sup>52</sup> This promotes impartiality and independence, a cardinal principle of the rule of law that likens justice to be blind to all and inclined to none except to facts and truth.

In the Nigerian context, military regimes set up special tribunals to try offences that were codified in existing laws and open for a normal court's consideration. Reasons cited for this included the slow pace of the justice system, technicalities in normal courts, and the need to mete out justice swiftly as deterrence, especially in cases of societal vices such as armed robbery, drugs and fraudulent practices.

Akanbi, however, notes that no sooner had these Tribunals been set up that they became instruments of oppression in the hands of the current military regime against perceived opponents. Secondly, in place of speedy adjudication, most of the Tribunals were characterized by snail-like speed in the determination of cases brought before them. In addition, their existence tended to undermine the fairness of the criminal justice system<sup>53</sup> and further acted as a dilution of the judicial powers constitutionally vested in the courts.<sup>54</sup> Also worthy of note is the fact that the decisions from these tribunals were not open for appeal to the regular courts; rather, in most cases, appeals were to another appellate tribunal or to the highest military ruling body.<sup>55</sup>

The erosion of basic principles behind of the rule of law doctrine was the major concern that the setting up of these tribunals portended. They were not bound by the established rules and procedures of fair hearing and in some cases, the hurried and

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<sup>52</sup> Sagay, I.E., *The Judiciary in a Modern Democracy in Nigeria: Issues in the 1999 Constitution* in Ayua, I.A., et al (eds) 2000 NIALS at 78.

<sup>53</sup> Anyebe, P.A., Fair Hearing and Rule of Law, in in Rule of Law and Good Governance, eds, Azinge, E. and Owasanoye, B., Nigerian Institute of Advanced Legal Studies, 2009 at 56.

<sup>54</sup> Section 6(6) of the Constitution of the Federal Republic of Nigeria; Section 6(6) 1995 draft Constitution of Nigeria. Also see Decree No 9 of 1993 which invalidated all court decisions and orders over any matter before the Tribunal. This had the effect of making Tribunals superior to regular courts.

<sup>55</sup> Akanbi, note 3 at 5.

secretive nature of the trials led to the illegal meting out of punishment including hurried execution, which amounted to extra-judicial killing by the state.<sup>56</sup>

### **5.3.7 Reign of Discretion**

The rule of law dictates that those who “govern us cannot wield the power of the state towards their personal ends either just because they want to . . . or because they have force on their side.”<sup>57</sup> It ensures the restraint of government discretionary actions through a pre-set general rules, which are predictable in their application and susceptible to straightforward judicial enforcement notwithstanding who is involved.

Oluba<sup>58</sup> captures in succinct form, the effect which the rampant exercise of discretion in military regimes had on the rule of law and by extension sustainable economic development. The power to enunciate and vary policies resided with the leader and the exercise of that discretion either way was not predicated on any other verifiable parameters. Since the levels of consultation were limited only to those who were in the good books of the ruling dictator, alternative viewpoints did not find room for ventilation. This led to severe limitations in the robustness of formulated policies. The result, according to Oluba, was the formulation of barrages of inappropriate political and macroeconomic policies.

### **5.3.8 Closed System of Government**

For the rule of law to prevail in a state, the affairs of government must be organised and run openly through channels that allow for robust engagement by and between the governed and the government through access, participation and ownership of policies and programmes.

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<sup>56</sup> One such tragic case is the Ogoni case involving the late playwright Mr. Ken Saro Wiwa and eight others, who were tried by the Ogoni civil disturbances tribunal. The convicts were sentenced to death by the tribunal in November 1995 and a few days to the expiration of their period of appeal to the Provincial Ruling Council, the highest military decision-making body, the men were executed to the chagrin of right thinking members of the society both local and international. Report contained in Akanbi, note 5 at 5.

<sup>57</sup> Shane, P.M., *Madison's Nightmare: How Executive Power Threatens American Democracy* in Shane, P.M., *The Rule of Law and the Inevitability of Discretion*, Public Law and Legal Theory Working Paper Series, No. 212, 2013.

<sup>58</sup> Oluba, M., *The Rule of Law and Economic Development in Nigeria*, Economic Reflections, Volume B, No 22, August 2008.

Within the Nigerian context, the military ruled through a process that can be better referred to as a cabal system. Coup planning is an offence that is treasonable; the reasoning goes that those who take the risk of planning and executing coups, knowing the punishment that awaits them, should be allowed the benefit of enjoying the spoils of coup planning. Thus in Nigeria, the "spoils of coup planning" is the appropriation of power and government positions for personal gains. This was invariably restricted to an inner cabal that planned, risked their lives and executed the coup. All others were deemed outsiders, likened to cowards. Affairs of the nation were carried out based on patronage using a close circle of those in the good books of the leadership.<sup>59</sup> There was no coherent process of involving and engaging the led by the leaders in governance processes.

Professor of African politics, Ali Mazrui, posited that the years leading up to 1979 were the "closed years" for Nigeria as the military governments controlled and released only information that they determined the public needed to know, and any attempt to lift the veil of secrecy was met with brutal suppression.<sup>60</sup>

### 5.3.9 Retroactivity of Laws

Another manifestation of the military's *modus operandi* in governance evidenced itself in the enactment of retrospective decrees. By their nature they went against the very grain of the doctrine of the rule of law. They were structured to make persons liable for punishment without their having had the opportunity to avoid breaking the law. Put differently, the retroactive laws turned an otherwise innocent person into an offender for an act done yesterday, which the law had made an offence today but attached a punishment with effect from yesterday. Two examples stand out here.<sup>61</sup>

Decree No.20 of 1984 was introduced with drastic penalties to deal with various crimes including possession of cocaine. The decree was deemed to have come into effect

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<sup>59</sup> Ibid.

<sup>60</sup> Mazrui, A. A., *The Africans, A Triple Heritage*, Little Brown & Co (P); Mti edition (September 1987) at 182.

<sup>61</sup> Akanbi, note 3 at 6.

on 31st December, 1983 although it was actually promulgated on the 6th of July, 1984. The consequence of this retroactivity was that what was lawfully done before the promulgation of the law suddenly became criminalised. As a result three convicted drug dealers were sentenced to death and executed by firing squad on April 14, 1985.<sup>62</sup>

Another was the Lands/Title Vesting Decree No 52 of 1993, whose effective date was backdated to January, 1975. The import of the section was to circumvent the Land Use Act of 1978, which vested ownership of land in the state government raising Rule of Law concerns about whether such decrees were for the public good, to protect the interest of the society or to advance the interest of some highly placed individuals in the country.<sup>63</sup>

#### **5.3.10 Personification of Law by Military Rulers**

Dicey<sup>64</sup> and Wade<sup>65</sup>, two of the foremost proponents of the rule of law concept, envisioned a situation where all men, no matter their status or position in the society will be considered equal and treated as such by the law and that the law would be pre-eminent and men under the law. The prevalent situation during Nigeria's military regimes was a sad testimony against the above thesis.

Most military governments suffered from what can be termed the “Alpha and Omega” syndrome, which is a situation whereby the military in power believes that they are above the law. What they determined was the law and had to be obeyed without question; otherwise consequences of their choices would follow.<sup>66</sup> Two incidents, catalogued by Akanbi, exemplify this.

In 1985, Chief Odumegun Ojukwu, the former Biafran leader was forcefully ejected from his residence in Lagos by a multitude of armed men without due process and against a subsisting court order. The Supreme Court, while describing the forceful

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<sup>62</sup> Ibid at 6.

<sup>63</sup> Jegede, J.K., *The Rule of law in a Military Government: An appraisal*, 1999, Nigerian Law and Practice Journal, 19.

<sup>64</sup> Dicey, note 1.

<sup>65</sup> Wade in Akanbi note 3.

<sup>66</sup> Jegede, note 63.



ejection as an act of executive lawlessness, went further to reiterate that the "...essence of the rule of law is that it should never operate under the rule of force or fear"<sup>67</sup>

Yet again, arising from a traffic offence involving the late chief M.K.O Abiola's son and an Air Force driver, the latter took the law into his hands and invaded the chief's house, molesting and detaining the chief and members of his family. This act was condemned as outrageous, brutish and barbaric and not "...only an assault to the dignity of Chief Abiola but that it was also an assault on the rule of law and freedom of the people of Nigeria." Yet there was no remedy for the act of lawlessness by a supposedly lawful entity.<sup>68</sup>

It must be concluded, therefore, that the contemplation of a military regime and constitutionalism coexisting is a mutually exclusive proposition. To expect a military government to hold itself subject to and limited by a supreme constitution whose foundations are built on the principles of the rule of law is a contradiction that is unlikely to manifest itself. Principles and concepts inherent in the rule of law idea such as a fair hearing, the separation of powers, and the independence of the judiciary and personal liberty, though allowed to exist on the statute books, were only observed in the breach. This is so because, *ab i nitio*, their coming into power negates in a fundamental way, the principles of the supremacy of law, which exist in each of the civilian constitutions that they supplanted. Section 1(2) of the 1999 Constitution of the Federal Republic of Nigeria, which provision existed in each of the previous Constitutions, provides that:

The Federal Republic of Nigeria shall not be governed nor shall any group of persons take control of the government or of any part thereof except in accordance with the provisions of this Constitution

To conclude the examination of the fate of the rule of law under the military regimes in Nigeria, the words of Claude Ake are worth quoting here:

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<sup>67</sup> Military Governor of Lagos State v Ojukwu, 1 NWLR, 1986: 626.

<sup>68</sup> National Concord Newspaper, Nigeria: 1988, January, 28: 10 in Akanbi, note 3 at 6.

...the military and democracy are in dialectical oppositions. The military is a taut chain of command; democracy is a benign anarchy of diversity. Democracy presupposes human sociability; the military presupposes its total absence, the inhuman extremity of killing the opposition. The military demands submission, democracy enjoins participation; one is a tool of violence, the other a means of consensus building for peaceful co-existence.<sup>69</sup>

An analysis of how the rule of law doctrine fared during the period of democratic rule follows. This period is very relevant as it was during the 1980s that the economic reforms gained traction leading to the establishment of IRAs into Nigeria.

#### **5.4            Civilian Dispensations**

Prior to the civilian rule of May 1999, Nigeria's human rights record was a monotonous one characterised by brutal military regimes with a brief punctuation of attempted civilian rule between 1979 and 1983. Unlike military regimes, civilian regimes by their democratic nature seek to acquire power through a political process. This route includes an electioneering process of selling their programmes to the voting public (campaigning) to seek an electoral mandate from the electorate to govern based on the programmes they espoused during the electioneering process. The basic instrument that spells out the political economy of the nation, who gets what, how and for what purposes, and guides the whole process is the Constitution.

The legal instruments that have guided civilian regimes in the several civilian governments since independence have been the Republican Constitution of 1963, the 1979 Constitution of the Federal Republic of Nigeria, and the 1999 Constitution of the Federal Republic of Nigeria.

Apart from its numerous provisions that spell out the architecture of power in the nation, each of these Constitutions contained provisions that implicitly (and in certain cases explicitly) acknowledged and endorsed the separation of powers concept.

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<sup>69</sup> Ake, C., *A Plausible Transition*, Tell, No. 39, 1995, Lagos (September 25) at 34.

They also included among others the basic human rights, termed “Fundamental Human Rights”, that relate to rights to life; dignity of human person; personal liberty; fair hearing; private and family life; freedom of thought, conscience and religion; freedom of expression and the press; peaceful movement, assembly and association; freedom from discrimination and the right to acquire and own immovable property.

A consideration of the architecture and contours of the rule of law and the government adherence to its ideals under the democratic dispensations will therefore be undertaken, judging their performance against the grand norm - the Constitutions. In the light of the importance and relevance rule of law to the effective functioning of IRA model, an attempt has been made to be as contemporary as possible. Extensive reliance has been placed on recent country studies by locally based human rights organisations, international rights monitors, and scholars in the field.<sup>70</sup>

Some of these international bodies are the leading global NGOs that propagate adherence to human rights, while the National Human Rights Commission of Nigeria is the statutory body set up to monitor and report on the state of human rights in Nigeria. The last two are Nigeria’s leading human rights advocacy NGOs.

The state of human rights enforcement and rule of law regime in Nigeria since the return to democratic rule from 1999 to date, from the reports listed above, shows that government’s human rights record has been poor. There have been some marginal improvements in a few areas but the overall picture is bleak.

Worthy of mention are the improvements that have the direct benefit of the ushering in of democratic governance. Unlike during military regimes, the separation of powers concept has seen fulfilment in the current dispensation save for the continued foray of the executive arm into the jurisdiction of the other arms of government in a bid

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<sup>70</sup> Some of the reports include Human Rights Watch World Report 2013; United States of America State Department: Nigeria 2013 Human Rights Report; Report on Human Rights Issues in Nigeria Joint British-Danish Fact-Finding Mission to Abuja and Lagos, Nigeria 19 October to 2 November 2004; A Report on the State of Human Rights in Nigeria, 2007, National Human Rights Commission of Nigeria; Amnesty International Human Rights Annual Report, 2012; *Human Rights Monitor, Nigeria*; and *Civil Liberties Organisation, Nigeria*.

to control and dominate them. Ouster clauses, special courts and tribunals, and the retroactivity of laws are no longer a feature of Nigeria's legal landscape. All laws in force before the commencement of the 1999 Constitution that are deemed repugnant to the democratic ethos, are by the clear wordings of Section 1 (3) of the 1999 Constitution, rendered nugatory.<sup>71</sup> With the existence of a tripod system of power sharing under the Presidential system, the era of closed government has gone as citizens have various avenues to give vent to their views and participate in governance.

Even with these improvements major problems still abound.<sup>72</sup> A survey of the key elements of the constitutionally guaranteed rights buttresses this point.

The primary mechanism through which the rule of law affects IRAs is its impact on the system of private property. This right to property starts with one's rights to life which is invariably the most fundamental property any person can possess. At birth, humans find themselves jealously and desperately guarding their lives from harm and death, and the pursuit of prosperity in the business arena takes a second place. There would be no business if there was no life.

This basic personal right to life and dignity of the person has major enforcement challenges in the present civilian dispensation. The culture of lack of respect for human life and dignity of the person in the Nigerian society is reflected in the high number of extra-judicial, summary, and arbitrary executions prevalent in Nigerian society. This has been compounded by the long period of military rule, which has affected the psyche of the law enforcement agencies that carry out their functions in circumstances devoid of human rights consideration and respect for rule of law.<sup>73</sup> Torture, cruel,

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<sup>71</sup>Section 1(3) states that "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void." Since all the rights guaranteeing rule of law and fair hearing as embedded in Chapter 4 of the Constitution containing Fundamental Human Rights there are deemed to have abrogated every obnoxious law.

<sup>72</sup> Ojo, note 43.

<sup>73</sup> A Report on the State of Human Rights in Nigeria, 2007, National Human Rights Commission of Nigeria.

inhuman or degrading treatment or punishments have routinely become tools of investigation and a modus operandi in the hands of law enforcement agencies.<sup>74</sup>

The Country Reports referred to above catalogue some of the human rights violations that have defaced Nigeria's record since the return to civilian rule. These include numerous arbitrary or extra-judicial killings by government and its agents including vigilante killings, prolonged pre-trial detention and denial of fair public trial, executive influence and control of the judiciary, and infringements on citizens' privacy rights. Others included restrictions on the freedoms of speech, press, assembly, religion, and movement, official corruption, violence against women, child abuse, female genital mutilation/cutting, infanticide, and sexual exploitation of children. The other violations documented were trafficking in persons, discrimination based on sexual orientation, gender identity, ethnicity, regional origin, religion, and disability, forced, bonded and child labour.

Some of the most serious human rights abuses committed during the immediate past periods were by Boko Haram,<sup>75</sup> which conducted killings, bombings, abduction, rape of women, and other attacks in almost all the states in the northern part of Nigeria. They resulted in numerous deaths and injuries, and widespread destruction of property. In response, the Army has been engaged in extrajudicial killings, torture, rape, beatings, arbitrary detention, and mistreatment of detainees.<sup>76</sup> In addition, a fertile ground for violent militancy emerged, because of the failure of government to address the widespread poverty, corruption and police/army abuses. As a result, since 1999

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<sup>74</sup> Ojo, note 43.

<sup>75</sup> Boko Haram also known as Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad, which translates to mean "Western education is forbidden".

<sup>76</sup> Amnesty International in a written statement to the 28th Session of the United Nations Human Rights Council in June, 2015 said the Nigerian security forces in its response to Boko Haram had committed serious human right violations. The evidence in Amnesty International's possession suggests that Nigeria's military has also committed crimes under international law, which may include war crimes and crimes against humanity. A complete rendition of the scale of destruction, abductions, killings and rights violation on unimaginable scale is contained in Ojo, note 26 at 23 - 24.

more than 18,000 people have died in inter-communal, political, and sectarian violence.<sup>77</sup>

Since the return to civilian rule there has been the introduction of Sharia law in some northern states. Part of the penal structure includes, punishments such as amputation for theft, stoning to death in case of adultery, caning for fornication and public drunkenness. It is still a live argument as to whether punishments such as caning constitute “torture or ... inhuman or degrading treatment” as stipulated in the Constitution.<sup>78</sup>

Even though the 1999 Constitution provides for an independent judiciary which is the bastion of the rule of law,<sup>79</sup> in practice the judicial arm remains susceptible to influence by political leaders at both the state and federal levels, and suffers from corruption and inefficiency. This has manifested in several ways.

After barely four months in office, the civilian government of Shehu Shagari deported a Nigerian, Shugaba Darma, the majority leader of the Borno State House of Assembly to Chad Republic, by declaring him a prohibited immigrant. The grounds for his deportation were that government believed Darma was a serious danger to public safety and order as well as to the rights and freedoms of others in Nigeria. These were serious allegations that required a thorough investigation before the applicant could be declared guilty. At the immigration office before his deportation, Darma had insisted he was a Nigerian and that his claim should be investigated. Rather than accede to his request, and seek an order of the court authorizing his deportation, the Minister purportedly acting under the Immigration Act 1963, went ahead to deport him. It is interesting to note that Darma was of the Great Nigerian People’s Party while the central authority was controlled by the National Party of Nigeria. His party had an overwhelming majority in the Borno State House of Assembly, and the party’s

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<sup>77</sup> Human Rights Watch World Report, 2013 at 140.

<sup>78</sup> Section 34(1)(a).

<sup>79</sup> Section 6.

candidate also won the governorship election.<sup>80</sup> The deportation order was quashed by the Borno State High Court, and later affirmed by the Federal Court of Appeal.<sup>81</sup>

Secondly, in 2004 and notwithstanding the Supreme Court ruling ordering the Federal Government of Nigeria (FGN) to release the withheld funds due to the Local Government Development Authorities created by the Lagos State (an act the FGN considered illegal), the FGN refused to obey the decisions until the Yar'adua government came in.<sup>82</sup>

Thirdly, the rule of law has come to be mean what the ruling party or the President says it is since the return to civilian rule. The continued flagrant disregard for the rule of law led the Nigerian Bar Association (NBA) to embark on a nationwide boycott of the courts to press home their demand for the government to return to the path of recognising and respecting court orders and rulings.<sup>83</sup> The brazenness of the Executive disobedience of court orders and sometimes interpreting them to suit their purpose became alarming, with the NBA recording a total of 75 cases of disregard for or disobedience of court orders and processes from the inception of the democratic rule in 1999 to 2009.<sup>84</sup>

Fourthly, underfunding or starving the judiciary of funds has been a regular occurrence, further undermining the rule of law.<sup>85</sup> Wherever the executive perceives

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<sup>80</sup> Nwabueze, B., *Nigeria's Presidential Constitution, 1979-1983, 1985*, Ibadan: Longman Nigeria Ltd., 205 at 205.

<sup>81</sup> *Shugaba Darma v. Federal Minister of Internal Affairs & Others*, 1981 at 516 in Akanbi, M.M., *Rule of Law in Nigeria*, Journal of Law, Policy and Globalisation, Vol. 3, 2012.

<sup>82</sup> Udombana., N., *The Judicial Application of the Rule of Law in Nigeria* in *Rule of Law and Good Governance*, eds, Azinge, E. and Owasanoye, B., Nigerian Institute of Advanced Legal Studies, 2009 ; Plateau, Oyo, Bayelsa states governments had clear and unequivocal court decisions which the Federal government as a result of their control of the coercive apparatus of the state refused to implement. Aduba, J.N., *The Rule of Law and the Promotion of Human Rights in Nigeria*, in *Rule of Law and Good Governance*, eds, Azinge, E. and Owasanoye, B., Nigerian Institute of Advanced Legal Studies, 2009.

<sup>83</sup> Ibid at 363.

<sup>84</sup> Aduba, note 82 at 109.

<sup>85</sup> Onanuga, A., et al, *How to ensure judicial independence*, The Nation Newspaper, Nigeria, September 18, 2012.

assertiveness and independent traits on the part of the judiciary, the weapon of withholding allocations becomes a ready means to helm them in.

Finally, the executive arm of government has displayed contempt for other arms of government as evidenced by the unilateral declaration of a State of Emergency in some states and the suspension of democratic structures without due process and in flagrant contravention of constitutional provisions.<sup>86</sup>

#### **5.4.1 Abuse of the Separation of Powers Doctrine**

The three arms of government, especially the executive and the legislature, have on several occasions trampled on the constitutionally sanctioned separation of powers concept rendering it ineffective. This in turn has made the attainment of the ideals of constitutional democracy a mirage in Nigeria so far.

For instance, the quest of the executive arm to control the legislative and judicial arms of government which is an afterglow of the military foray into political governance, dimmed the hopes for the entrenchment of an enduring democratic culture. Where they were able to, the executive bought and dictated both to the other two arms, and where they are unable, they selectively chose which of the legislative initiatives and judicial pronouncements they would abide by.<sup>87</sup>

Conversely, the legislature has continued to attempt repeated forays into the executive jurisdiction through encroaching into essentially pure executive functions such as budget-making and implementation, while at the same time seeking to not only

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<sup>86</sup> A compendium of the reaction of eminent legal scholars, practitioners and analysts such as Chief FRA Williams, Gani Fawehinmi, Professor Ben Nwabueze, Rev Father Matthew Kukah, etc in 2004, FWLR (Part 213) at vii - xxiv in Dakas, C.J, Democratic Governance and the Rule of Law in Nigeria in *Rule of Law and Good Governance*, eds, Azinge, E. and Owasanoye, B., Nigerian Institute of Advanced Legal Studies, 2009.

<sup>87</sup> Oluba, note 58.



make but also interpret laws, a function assigned to the Judicial arm, for mostly self-seeking and selfish reasons.<sup>88</sup>

In addition, the attempt by the executive arm to distort the rule of law doctrine has also continued to manifest in its horizontal relationship with components of the federal structure, thus infringing on federalist principles enshrined in the Constitution.<sup>89</sup> This has manifested in the several acts of manipulation of the legislative and judicial arms in several states to force the impeachment and removal of democratically elected governors through extra legal means.<sup>90</sup>

#### **5.4.2 Breaches of the Rule of Law**

Breaches of the rule of law during the civilian era also sprouted in areas where the executive exercised its powers outside the constitutional ambits and stipulations. In simple terms, the rule of law was reduced to rubble during the tenure of the Shagari.<sup>91</sup>

Obasanjo's tenure as a civilian head of state between 1999 and 2007 has been adjudged in constitutional historical circles as the worst in ranking for abuse of the rule of law and constitutionalism.<sup>92</sup> This may be understandable considering his leadership style and high-handedness which was a throwback his military background as a retired army general. Under his tenure, serial disobedience of court decisions; deployment of state security agencies and anti-corruption agencies to witch-hunt and beat political opponents into line; distortion of the federal structure by unilateral and

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Several examples abound on the manipulation through intimidation, coercion, threats, and inducement of the legislative and judicial arms in the states through using the federal apparatus to remove the governors of Plateau, Oyo, Ekiti, Anambra, Adamawa and other elected officials. See also Okerefor, L., *Oyo State: Let the Judiciary Beware*, [www.accesstojustice.org](http://www.accesstojustice.org); and Jega, M., *A Nation in Crisis*, 2006, Weekly Trust, October 22, 2006.

<sup>91</sup> The Nation Newspaper, Nigeria, September 18, 2012 .

<sup>92</sup> Ibid at 3-8.; Udombana, note 82 at 360; and Shehu, A.T., "Constitutional Crises between the Executive and the Legislature 1999-2003", 2009, Unpublished Ph.D Thesis, Faculty of Law, University of Jos, Nigeria, 175-183.

unconstitutional acts; unlawful impeachment and removal of elected governors;<sup>93</sup> among others,<sup>94</sup> acts that can be rightly termed “official lawlessness” were the norm.<sup>95</sup>

## 5.5 Conclusion

The foregoing consideration of the state of Nigeria’s adherence to the rule of law principle since independence, transcending both democratic and military regimes, has returned a verdict of poor performance. A study of the architecture of the regimes and the nature of the political economy of Nigeria points to several reasons for this poor observance of rule of law:<sup>96</sup>

First, the high illiteracy level in the country cannot easily safeguard human rights and the rule of law. Nigeria has an abysmal level of literacy between 39% -51% with 32% male and 21% female secondary schools. That means more than 50% its male and 80% population are illiterates. With such a high percentage of the citizenry completely illiterate, mass mobilisation of civil society and the citizenry to be alive to and fight for their rights becomes a daunting task.

Second, closely linked to this, is the lack of a virile and enlightened civil society that is undergirded by vibrant media. Even where citizens are aware or conscious of the abuse of their rights, the institutional processes for redress are unknown to them or cumbersome and costly to undertake. The link tying literacy, human rights abuse and democratic vitality, avers that “democracy is not safe in a country where a large minority of the population is illiterate.”<sup>97</sup>

Third, the pervasive poverty in the country accounts in a major way, for the lack of flourishing of the rule of law concept and its accompanying rights. This worrisome

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<sup>93</sup> Dapianlong and Ors V Dariye & Ors, (No 1), 2007, All FWLR (Part 373), 1, at 78 -79.

<sup>94</sup> Nwabueze, note 74 at 3-8.; Udombana note 82 at 360; Akanbi note 5.

<sup>95</sup> Geoff Budlender, *On practising law*, cited in Corder H., note 13 at 773.

<sup>96</sup> Ojo, note 27; Obadan, M. T., *Integration Approach to Rural Poverty Reduction in Nigeria*, 2002, *Nigerian Tribune*, Ibadan, 12 March 2002.

<sup>97</sup> Ibid.

reality is underlined by the information that approximately 21.9 % of Nigeria's labour force was unemployed in 1998. With an estimated active labour force of 55.75 million in 2000, this translates to over 12 million Nigerians who were in need of suitable employment.<sup>98</sup> This fact was much underscored by the erudite scholar and jurist, Akintola Aguda who stated:

The practical actualization of most of the fundamental rights cannot be achieved in a country like ours where millions are living below starvation level... In the circumstances of this nature, fundamental rights provisions enshrined in the constitution are nothing but meaningless jargon to all those of our people living below or just at starvation level.<sup>99</sup>

Four, the pervasiveness of corruption in the body politic has in no small measure affected the fate of the rule of law concept. As aptly stated:

Corruption renders codified law ineffective. By weakening property rights, corruption deprives investors of compensation for risk taking and increases uncertainty about potential investment payoffs. This decreases the incentive to invest, which in turn dampens economic growth.<sup>100</sup>

The legitimate expectation that when Nigeria returned to democratic governance, the rule of law would flourish with the attendant dividends of citizens enjoying a robust cocktail of human rights contained in the Constitution has so far been dashed in Nigeria. This failure has also shown that the disregard for the rule of law is not the exclusive feature or preserve of the military government, as democratic governments have also been implicated in the rule of law's travails in Nigeria. Nigeria can thus be considered to have a Constitution that espouses an ideal which is devoid of constitutionalism and the rule of law.

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<sup>98</sup> Yesufu, T.M., *The Human Factors in National Development in Nigeria*.1995, Ibadan, Nigeria: Spectrum Books Limited.

<sup>99</sup> Aguda, A., *Judicial Process and Stability in the Third Republic*. National Concord, Lagos, Nov. 7 1998 at 7.

<sup>100</sup> Higbee, J., and Schmid, F.A., *Rule of Law and Economic Growth*, 2004, International Economic Trends, The Federal Reserve Bank of St. Louis.  
<http://research.stlouisfed.org/publications/iet/20040801/cover.pdf>.

A Nigerian political scientist, Julius Ihonvbere, writing in a book honouring the late Professor Billy Dudley lamented, personal freedoms that were not allowed during the period of colonial rule are paradoxically “severely limited” even during the periods of democratic governance in Nigeria.<sup>101</sup> This is a sad but true conclusion on the state and condition of the political economy of Nigeria and its rule of law landscape.

The trend continues. The culture of corruption at all levels, arbitrariness, executive attempts at dominating and controlling other arms of government, the neglect of education as a tool for development and mass mobilization all points to a gloomy future for the rule of law concept. Given the rule of law’s poor scorecard and recalling its centrality to the functioning of the IRA model, it is doubtful if IRAs have a suitable climate to deliver on their mandate in the wake of the institutional deficits of the rule of law.

Chapter 6 will seek to undertake a review of the performance of the IRAs in Nigeria so far, testing their efficacy against the ideals of the concept weighed on comparative scales with Brazil and Ghana, two countries with similar cultural and developmental features as Nigeria.

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<sup>101</sup> Ihonvbere, J, in a chapter of a book honouring the late Professor Billy Dudley, edited by Oye Oyediran in 1996 contained in Ekeh, P.P., *Theory and Curse of Military Rule and the Transition Program*, Association of Nigeria Scholars for Dialogue, [http://www.waado.org/nigerian\\_scholars/archive/opinion/theory.html](http://www.waado.org/nigerian_scholars/archive/opinion/theory.html).

## CHAPTER 6

### COMPARATIVE ANALYSIS OF INDEPENDENT REGULATORY AGENCIES IN BRAZIL, GHANA AND NIGERIA

#### 6.1 Introduction

The preceding chapters dissected the rapid spread of the Independent Regulatory Agencies (IRAs) as a solution to the infrastructure deficits across countries including Nigeria. The process revealed that key institutional structures, norms and systems that should be in place to support the successful transplant of the IRAs into Nigeria are either missing, or where they exist, are in a very weak state. Given this finding, this chapter undertakes a comparative investigation of how the IRA model has fared in two selected developing countries that also have weak and fragile institutional structures. The countries chosen are Brazil and Ghana.

The choice of these two nations is informed by the shared commonalities in their political economies and the lessons that the comparisons portend for Nigeria.

Brazil's demographic composition is similar to that of Nigeria, with a large population (Brazil - 202 million and Nigeria 160 million people); each nation is endowed with a substantial measure of natural resources; and each has experienced European colonialism, though of different types. Both nations have a long tradition of authoritarian politics characterised by long periods of military incursion into political governance with severe consequences. These include, stark poverty, social marginalisation by elite classes leading to crass inequality, clientelism, political and civil violence.<sup>1</sup>

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<sup>1</sup> Santos, S. B., *Two Democracies, Two legalities: Participatory Budgeting in Porto Alegre, Brazil*, in *Law and Globalization from Below Towards a Cosmopolitan Legality*, in *Law and Globalization from Below, Towards a Cosmopolitan Legality*, Cambridge Studies in Law and Society, eds, Santos, B.S., and Rodriguez-Garavito, C., September 2005.

As a result, the political economies of both nations are dotted by extensive corruption, patrimonialism<sup>2</sup> and impunity. Each have in the recent past transited to democratic governance, with a Presidential system of government as the model.

Furthermore, with regard to economic reforms generally and infrastructure regulation in particular, Brazil like Nigeria, within the past three decades undertook major institutional reforms promoted by intermediating agencies led by the World Bank and the International Monetary Fund that resulted in the setting up of IRAs in key utility sectors. The pattern of distribution of IRAs in both nations is largely similar.

Ghana also shares certain commonalities with Nigeria that are also germane to this thesis. Apart from being neighbours in West Africa, both countries went through British colonialism and became independent within six years of each other. In each, the military intervened into political governance under similar circumstances by overthrowing the civilian leadership that emerged at independence. What followed in both nations was a long interregnum of military rule that has now been replaced by a presidential system of government.

Coincidentally, both nations embarked on economic reforms under authoritarian military regimes.<sup>3</sup> Equally too, reforms were promoted by intermediating agencies. Like Nigeria, the State Owned Enterprises (SOEs) that were set up to serve as the engine room of economic development performed poorly within the context of government

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<sup>2</sup> Patrimonialism is used here to describe a style of authority where a 'big man' rules by dint of personal prestige and power, while followers are treated as extensions of his household. Authority is personalised and shaped by the ruler's preferences, rather than any codified system of law. The ruler ensures political stability and personal political survival by selectively distributing favours and material benefits to followers or clients.

<sup>3</sup> Aryeetey, E, *The Institutional and Policy Framework for Regulation and Competition in Ghana*, Centre on Regulation and Competition, Working Paper Series, Paper No. 46, December 2002 at 5.

assuming the conflicting roles of owner, manager and regulator.<sup>4</sup> The discovery of oil in 2007 in Ghana heightened expectations for additional revenue to fund socio-economic development while at the same time raising concerns for the resource curse phenomena. Ghana has also undertaken reforms leading to opening up of infrastructure provision and services to the private sector in three major utilities, water, electricity and telecommunications, though the public sector is still predominantly involved in the ownership and provision of infrastructure and services.

In order to undertake a comparative analysis of IRAs in the two selected countries that is coherent, verifiable and meaningful, it is necessary to specify the benchmarks used. The adopted guide is derived from the key principles that underpinned the conceptualisation of the IRA model in the United States of America (USA) and its eventual adoption by the intermediating agencies, who in turn recommended to developing countries as a part of the reform package.<sup>5</sup>

## **6.2 Conceptual Principles of IRAs**

For an IRA to satisfy its conceptual origins, it must possess three basic ingredients, namely credibility, legitimacy, and transparency. Firstly, on credibility, investors must have confidence that the regulatory system will honour its commitments. This is central in attracting private sector investors especially in utility sectors that typically require long tenured investments whose return on investments takes time to mature. Private investors in the utility sectors have two primary concerns that a credible regulatory system must aim to satisfy. One is the necessity to obtain clear regulatory commitments from government, and the other is the assurance that the commitment will actually be honoured in order to allow investors to recoup their investments and have a reasonable return thereon.<sup>6</sup> The credibility test also serves as an insulation against short-term populist or politically induced pressure to reduce prices in volatile developing

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<sup>4</sup> Ibid at 18.

<sup>5</sup> Brown, A, et al., *World Bank Handbook for Evaluating Infrastructure Regulatory Systems*, 2006, The World Bank, Washington, DC.

<sup>6</sup> Ranjit, L. and Saeed, K., *What International Investors Look for When Investing in Developing Countries*, 2003, Energy and Mining Sector Board Discussion Paper 6, World Bank, Washington, DC, at 10 in Brown, note 4 at 108.

economies especially with an eye on electoral cycles.<sup>7</sup> Thus, the structure of the regulatory system should be of the kind that would attract credible commitments that would incentivise investors to invest with the comfort that their investments will be recovered within the regulatory time frames and guarantees.

Secondly, pertaining to legitimacy, consumers must perceive the regulatory system to be one that can protect them from the exercise of monopoly power or exploitation from service providers, whether through high prices or poor service, or both. This entails a balanced and fair evolution and implementation of the regulatory tools by IRAs, to ensure that the expectations of both the investors and consumers are satisfied through a regime of trade-offs and incentives. The role and effectiveness of IRAs is undermined where legitimacy is lacking, as neither party in the value chain considers the regulatory process legitimate.<sup>8</sup>

Thirdly, on transparency, an IRA must carry out its mandate in a transparent manner so as to attract to itself respect and acceptance by both the investor and consumer. The entire regulatory system and processes must be fair, impartial and open, with all the parties given the opportunity to participate in the process. Furthermore, at the end of every regulatory intervention, there must be a written statement detailing the evidence taken into consideration; a summary of the different representations and a full rendering of the basis for the final decision by the IRA.<sup>9</sup>

Encapsulated in the above ingredients are key principles that must underpin the structure and operations of an IRA for it to be deemed credible, legitimate and transparent. These include independence from all the players in the value chain; accountability for its actions; transparency and participation in all its systems and processes; the clear delineation and clarity of roles in a basic law, accompanied by

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<sup>7</sup> Newbery, D., *Rate of Return Regulation versus price regulation for public utilities*, 1997 available at <http://www.econ.cam.ac.uk/faculty/newbery/files/palgrave.pdf>.

<sup>8</sup> Kapika, J., and Eberhard, A., *Power Sector Reform and regulation in Africa: Lessons from Kenya, Tanzania, Namibia and Ghana*, 2013, Human Sciences Research Council Press, Cape Town, SA.

<sup>9</sup> Brown, note 5.



clarity in its operational rules buoyed by the requisite powers to carry out its mandate; a regime that engenders predictability and certainty; appropriate institutional endowments; and integrity.

These principles are deemed best practice<sup>10</sup> as they seek to accomplish both internal and external objectives. Internally, they are designed to ensure fairness, balance, and substantive discipline in the decision-making processes of the IRAs. Externally, however, they are meant to protect and preserve the integrity, legitimacy, independence, and accountability of regulation and the IRAs. Although adherence to these principles alone will not necessarily achieve the intended objectives, failure to adhere to them will almost certainly put at risk the possibility of achieving them.

This thesis will now focus on the political economies of the two nations that are the subject of the comparison, tracing in the process the history of their infrastructure provision and the challenges faced, that led to the assimilation of the IRA model into their economic trajectory. Thereafter, it will ascertain the extent of adherence to these core principles in the institutional framework of IRAs in the countries given the contextual peculiarities of their institutional endowments.

### **6.3      Legal and Regulatory Framework of Independent Regulatory Agencies in Brazil**

The recorded history of Brazil began with the encounter of the indigenous people with Europeans at the opening of the 16th century under the sponsorship of Portugal. Their arrival signaled the beginning of a period of colonialism that lasted from the 16th to the early 18th centuries. The colonial settlements in the country expanded mainly along the coast lines of the south and west as trade routes.

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<sup>10</sup> Ibid

Within this same period, other European countries, attracted by the vast natural resources and untapped land, tried to establish colonies in several parts of Brazilian territory until November 15th, 1822, when it declared its independence from Portugal.<sup>11</sup>

A military coup in 1889 established a republican government which was overthrown by a dictatorship (1930–1934 and 1937–1945). This was followed by another period of military rule (1964–1985) whose effects still haunt the nation till today.<sup>12</sup> In the 1970s the military government embarked on a number of ambitious projects in infrastructure development ranging from hydroelectric to nuclear power plants which were never completed. The economy was affected and inflation soared in the process. The country turned power over to civilians in democratic rule in 1985.<sup>13</sup>

Ownership and management of infrastructure had over the years resided both in the public and private sectors. Its quality and availability had however been ineffective and unable to meet the demands of a growing population. By the time the civilian government assumed power in the 1980s, reforms were all but inevitable. As a first step, the government passed the Law of Concessions<sup>14</sup> in 1995.

The Law of Concessions enabled government to offer public utilities for sale to the private sector, with the understanding that the latter was better equipped to manage them. The transfer would in turn, allow government to focus on planning, coordinating, regulating and monitoring the different sectors of the economy. It is to be noted that the Law of Concessions sought to operationalise Article 175 of the Federal Constitution, which lays out the broad rules and principles by which the government authorises private entities to offer public services. The Law of Concessions specified the

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<sup>11</sup> For a complete history see The New York Times, *A Brief History of Brazil*, [http://www.nytimes.com/fodors/top/features/travel/destinations/centralandsouthamerica/brazil/riodejaneiro/fdrs\\_feat\\_129\\_9.html?pagewanted=2&n=Top/Features/Travel/Destinations/Central and South America/Brazil/Rio de Janeiro](http://www.nytimes.com/fodors/top/features/travel/destinations/centralandsouthamerica/brazil/riodejaneiro/fdrs_feat_129_9.html?pagewanted=2&n=Top/Features/Travel/Destinations/Central%20and%20South%20America/Brazil/Rio%20de%20Janeiro) accessed on 26/03/15.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Law 8,987/95.

procedures to be followed in transferring the erstwhile public utilities to the private sector through a transparent and competitive process.<sup>15</sup>

This law was followed by reforms that were aggressively undertaken through privatisation of public monopolies to accelerate infrastructural investment across a range of sectors. As a consequence, between 1996 and 2005, ten IRAs in electricity, telecommunications, oil, gas, and other infrastructure sectors and services were set up.<sup>16</sup>

The architecture of these reforms began with the World Bank and the Organization for Economic Cooperation and Development (OECD) recommending to Brazil to sell off ailing SOEs and establish IRAs to regulate the entry and participation of the private sector as owners and managers of the public utilities in the place of government.<sup>17</sup>

Four major reasons accounted for the reforms: dwindling national treasury receipts that were unable to finance investments in the nation's developmental goals; technological advances that refuted the natural monopoly position for several utilities such as electricity and telecommunications to justify public ownership; and the collapse of the eastern bloc/communist ideology that was overly sensitive towards private

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<sup>15</sup> Batista, T.C., *Control of the normative power of the regulatory agencies by the Judicial Branch*, George Washington University - School of Business, Center for Latin American Issues, The Institute of Brazilian Issues, The Minerva Program, Washington - DC, Spring 2014.

<sup>16</sup> The agencies set up included Brazilian Electricity Regulatory Agency (ANEEL; Brazilian Agency of Telecommunications (ANATEL); National Agency of Petroleum, Natural Gas and Biofuels (ANP); National Regulatory Agency for Private Health Insurance and Plans (ANS); Brazilian Health Surveillance Agency (ANVISA); National Water Agency (ANA); Cinema National Agency (ANCINE); National Waterway Transportation Agency (ANTAQ); National Terrestrial Transportation Agency (ANTT); National Agency For Civil Aviation (ANAC); Batista, T.C., *Control of the normative power of the regulatory agencies by the Judicial Branch*, George Washington University - School of Business, Center for Latin American Issues, The Institute of Brazilian Issues, The Minerva Program, Washington - DC, Spring 2014; Silva, M.B., *Independence after Delegation: Presidential Calculus and Political Interference in Brazilian Regulatory Agencies*, Brazilian Political Science Review, (2011) 5 (2) at 40.

<sup>17</sup> Prado, M.M., *The Challenges and Risks of Creating Independent Regulatory Agencies: A Cautionary Tale from Brazil*, Vanderbilt Journal of Transnational Law [Vol. 41:435 - 503 at 444; OECD, The OECD Report on Regulatory Reform: Volume II: Thematic Studies (1997); OECD, Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance (2002); World Bank, World Bank Technical Papers No. 399, Concession for Infrastructure: A Guide to Their Design And Award (1998), available at <http://rru.worldbank.org/Documents/Toolkit>.

ownership.<sup>18</sup> However, the overriding motive for the setting up of the IRAs was government's signal not to act opportunistically against private investors once the investments were made and to offer credible commitments of consistency in policies, assurances that the private sector needed to invest.<sup>19</sup> The last reason appears to be the most apposite as Brazil was moving from an era where political actors had a propensity for being "demagogic and populist"<sup>20</sup> by interfering in tariff matters with an eye on the electoral cycle. As has been argued, Brazil has a

history replete with examples of government opportunism; debt payment moratoriums, confiscation of savings, use of utility tariffs to control inflation, several price freezes, manipulation of economic variables, renegeing of contracts, disrespect of intellectual property rights, arbitrary rule changes...<sup>21</sup>

Thus, their establishment was a pointer to a change in policy direction from unpredictability to certainty in policies and goals. This was also a departure from the prevailing governance model wherein self-regulation by departments within ministries was the norm to one in which the defining feature was independence from the political class.<sup>22</sup>

The overarching factor in the reforms was the desire to move away from public towards private ownership of infrastructure in order to attract private sector investment.<sup>23</sup> Unlike in the past where the political will to make those far-reaching reforms was missing, the government of President Cardoso (1995-2002) showed commitment in pursuing the reforms. Each line ministry was assigned the task of designing the structure of the IRA for its own sector. Prado notes that this process was

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<sup>18</sup> Goldstein, A., and Linhares Pires, J.C., *Brazilian Regulatory Agencies: Early Appraisal and Looming Challenges*, Centre on Regulation and Competition, Working Paper Series, Paper No. 43, December 2002.

<sup>19</sup> Mueller, B. and Perreira, C., *Credibility and the Design of Regulatory Agencies in Brazil*, *Brazilian Journal of Political Economy*, vol. 22, n° 3 (87), July-September/2002; Prado, note 15.

<sup>20</sup> Nester, A.W., Informativo Justen, Pereira Oliveira and Talamini, *Judicial Review of the Independent Regulatory Agencies*, Advogados, Curitiba No. 43, September 2010 accessed at <http://www.justen.com.br/informativo.php?informativo=43&artigo=8&l=en> on 31/7/15 at 11.05am.

<sup>21</sup> Mueller and Perreira, note 19; Prado, note 17.

<sup>22</sup> Silva, note 16 at 40.

<sup>23</sup> Prado, note 17 at 467.

carried out without a holistic plan; neither were there public discussions on the principles undergirding the independent regulatory model that was adopted nor the expected outcomes.<sup>24</sup> The direction of the reforms was therefore essentially dictated by three tendencies: the Presidential state of mind;<sup>25</sup> the inclination of the political head of the line ministry in question; and the mindset of the ministry bureaucrats.<sup>26</sup>

Worthy of note is the fact that even though the IRAs were set up in different sectors, their institutional design had inherent similarities. Top on the list of the similarities was the fact that all the IRAs were a creation of an enabling law that incorporated their functions, powers and institutional arrangements.<sup>27</sup> In addition, the common distinguishing feature was the independence and insulation of the IRAs from

Secondly, independence of the IRAs was enshrined in the enabling laws to insulate them from all other actors in the various sectors including the Executive, the regulated entities and the consumers. This was done in a number of ways. Firstly, the process of appointment and removal of Commissioners of the IRAs was scrupulously provided for as a most important feature of the independence of the IRAs.<sup>28</sup> There were institutional safeguards requiring Senate approval of Presidential nominations and removal of Commissioners in IRAs. This provided a check on the executive and ensured

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<sup>24</sup> Ibid.

<sup>25</sup> Mueller and Perreira, note 19 at 68.

<sup>26</sup> Ibid. The author indicates that the telecommunications Minister was regarded as the second most powerful person in the government after President Cardoso. Thus, despite the different interest groups making discordant demands regarding the regulatory agency's design, the Minister was able to impose what he thought was the best option for the sector.

<sup>27</sup> Vasconcellos, R.A.L., *Brazilian Regulatory Agencies: Future Perspectives and The Challenges of Balancing Autonomy and Control*, School of Business and Public Management, The Institute of Brazilian Business & Public Management Issues, The George Washington University, December, 2009.

<sup>28</sup> Essentially restricting the power of the Executive to abridge the terms of Commissioners is considered a central institutional test of IRA independence. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2000); Geoffrey Miller, *The Debate over Independent Agencies in Light of Empirical Evidence*, 1988 DUKE L.J. 215, 216 ("The distinguishing feature of [independent] agencies is that their principal officers are protected against presidential removal at will."); Alan B. Morrison, *How Independent Are Independent Agencies?*, 1988 DUKE L.J. 252, 252 ("There is no official definition of an independent agency . . . but for me an independent agency is one whose members may not be removed by the President except for cause.").

that only credible persons competent and fit to occupy the offices were nominated, in order not to risk a veto from the Senate.<sup>29</sup> It also served to make Commissioners so appointed owe an allegiance to the system and not to the appointing authority. Where no restrictions exist on the ability of the executive to remove a Commissioner without due cause, it will be unlikely for that Commissioner to make decisions that are at variance with what the appointing authority wanted.<sup>30</sup>

Thirdly, the adoption of a collegial system of decision-making as opposed to a sole Commissionership and staggered terms<sup>31</sup> that outlives the lifespan of a particular government in an electoral cycle, were provided for in the enabling laws. Typically collegial decisions lessen the likelihood of Presidential or other external interferences in the conduct of the affairs of IRAs, as opposed to a situation where decisions are made by an individual Commissioner.<sup>32</sup>

Fourthly, another vital guarantee of independence for IRAs was financial autonomy. This route involved the granting to the IRA, alternative funding streams that were outside that of the state treasury.<sup>33</sup> The reasoning behind this provision was to insulate IRAs from external control especially from the executive arm, as whoever provided for the financial needs of the IRAs would be positioned to unduly influence its autonomy.

Fifthly, all the enabling laws gave IRA Commissioners the powers to determine their organizational structure including who to employ in addition to reserving the

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<sup>29</sup> Smith, W., *Utility Regulators – The Independence Debate*, PUB. POL'Y FOR PRIVATE SECTOR, at 3 (World Bank Group, Note No. 127, Oct. 1, 1997).

<sup>30</sup> Prado, note 17 at 470.

<sup>31</sup> Lei No. 9.472, arts. 24–25, de 16 de julho de 1997, D.O.U. de 17.7.1997; Lei No. 9.472, art. 25, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil).

<sup>32</sup> Joskow, P.L., *Regulatory Priorities for Reforming Infrastructure Sectors in Developing Countries*, paper prepared for the Annual World Bank Conference on Dev. Econ., Wash., D.C., Apr. 20–21, 1998), available at <http://siteresources.worldbank.org/INTABCDEWASHINGTON1998/Resources/joskow.pdf> at 30–31.

<sup>33</sup> Smith, note 29; For example Decreto No. 4.691, art. 2, de 8 de maio de 2003, D.O.U. de 9.5.2003 a presidential decree limited the travel expenses of the employees of all executive branch bodies to 60% of the total amount spent in 2002 which was interpreted to mean all those drawing funds from the state treasury.

powers to hire external consultants to enrich the regulatory processes. The ability to attract and retain a qualified work force that can navigate the multi-faceted and interdisciplinary nature of IRA's functions and powers is important for its legitimacy and performance.<sup>34</sup> The ability to hire its own staff in no small way operated to assert the independence of the IRAs.

Sixthly, embedded in the enabling laws was an institutional arrangement that required IRAs to be transparent in their processes and procedures and impartial in their handling of regulatory functions. In addition, they were required to be accountable<sup>35</sup> for their actions by involving all stakeholders before any regulatory decision is made<sup>36</sup> while at the same time subjecting their decisions to judicial review.<sup>37</sup>

Notwithstanding the elaborate institutional safeguards contained in the enabling laws to insulate the IRAs from external influence and control, IRAs in Brazil have not enjoyed the level of independence the law designed them to have. Even though the IRA model is still in its early stages of implementation in Brazil, the regulatory outcomes when measured against the ideal deliverables show a patchy picture of a pattern of inability to adequately address the infrastructure deficits in Brazil. A review of literature<sup>38</sup> on the level of attainment of the best practices principles by IRAs in Brazil points to ten reasons for the lack of independence and ineffectiveness of IRAs in Brazil.

First, in the process of transplanting the IRA model in Brazil, certain institutional features inherent in the USA IRAs from where the IRA derived its roots were either not implemented or not transplanted into Brazil.

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<sup>34</sup> Brown, note 5.

<sup>35</sup> The Legislative arm has powers to amend or repeal any regulations or laws made by IRAs acting under its delegated powers if those regulations or laws are found to be inconsistent with the original delegating instrument- the basic law under the legal principle of "Democratic Rule of Law" See Vasconcellos, note 27 at 28.

<sup>36</sup> Ibid at 30.

<sup>37</sup> Brown, note 5; Vasconcellos, note 27 at 28.

<sup>38</sup> Prado, note 17; Vasconcellos, note 27.

An example was the absence of a mitigating legislation akin to the Administrative Procedure Act<sup>39</sup> in the USA that minimized the risk of the Executive tampering with IRA independence by reducing to the minimum the exercise of administrative discretion by the Executive towards IRAs. With the absence the Executive in Brazil has over time been able to interfere in the affairs of IRAs thus weakening the independence provisions in the enabling laws.<sup>40</sup>

Secondly, certain successful institutional features of the USA political and legal frameworks were unsuccessful in Brazil. In some of the USA IRAs, the Chairman serves at the President's pleasure and can be dismissed from the position at any time. Even though this appears less protective, the system worked well and has seen few cases of executive abuse, partly attributable to the strengths of the system coupled with maturity of the political class. In the Brazilian model however, despite being more protective than USA model by granting a fixed term to the Chairman, the length of that term is left to the discretion of the Executive.<sup>41</sup> This has been utilised severally to undermine the independence of the IRAs by fixing terms to align with electoral cycles and to meet political ends.<sup>42</sup>

Thirdly, certain features of the USA model that have institutional problems were notwithstanding transplanted to Brazil, replicating the same problems that have long existed in the USA. One is the matter of independent funding of IRAs. In the USA, in order to ensure IRA independence, alternative streams of income outside the national budget were provided for in the law. Notwithstanding this, between the President and the Office of Management and Budget (OMB) the "power of the purse" tendency was

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<sup>39</sup> The 1946 Act minimized the risk of political interference by reducing administrative discretion, increasing transaction costs to change policies, and granting courts power to interpret agency statutes, which limits the ability of new appointees to announce new interpretation of statutes. McCubbins et al *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999).

<sup>40</sup> Prado, note 17.

<sup>41</sup> Ibid at 473.

<sup>42</sup> Ibid.



deployed to hamstringing the financial independence of IRAs.<sup>43</sup> It took Congress action through a legislation to halt the interference of the Executive.<sup>44</sup> In spite of the apparent subversion of the independence of IRAs through “power of the purse” tendency, the Brazilian model adopted the path and with it came the same challenges the USA model faced. What has ensued from this is that despite clear provisions in each of the enabling laws granting IRAs financial autonomy, the executive has through executive actions subverted and rendered those provisions nugatory by subjecting IRAs to budgetary controls.<sup>45</sup>

Fourthly, the operational independence of IRAs which allows them to develop systems and processes that they deem will best allow them deliver on their mandate has been tampered with by removing their powers to defend their decisions on appeal in courts of law.<sup>46</sup> That in turn has not allowed IRAs to adequately defend their decisions and evolve a body of *stare generis* to be relied upon in future as it relies on another Executive body to defend its decisions in courts of law.<sup>47</sup>

Fifthly, the fixed terms provisions for Commissioners of IRAs have been compromised by the two inter-related concepts: the “throwing in the towel” and “political drift.” “Throwing in the towel” and “political drift” may occur where a new Head of State still finds ways to “convince” commissioners to resign before the end of their tenure, leaving a vacancy that will be filled by the Head of State’s own nominees.

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<sup>43</sup> Carpenter, D. P., *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283 (1996).

<sup>44</sup> Moe, T.M., *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197 (1982); B. Dan Wood, B., and Waterman, R.W., *The Dynamics of Political-Bureaucratic Adaptation*, 37 AM. J. POL. SCI. 497. (1993).

<sup>45</sup> Prado, note 17 at 490-496.

<sup>46</sup> By Implementing Order n° 164 of the Advocacy-General of the Union, of February 20, 2009 attorneys of IRAs were barred from defending the decisions of these bodies in the higher courts (Supreme Federal Court and Higher Courts of Justice). Thus, the defense of the decisions of the agencies before higher courts is now responsibility of a specific department of the Federal General Attorney Office - PGF, which is linked to the AGU, which is subordinate to the President.

<sup>47</sup> Vasconcellos, note 27.

The phenomenon has its origin in the USA but has in the recent past been mitigated by the provisions of the Administrative Procedure Act, 1946.

Sixthly, in spite of the administrative independence of IRAs, Presidents have through other legislation, subjected IRAs to its controls as a result of conditions inherent in the Brazilian political economy that incentivises Presidents to interfere with the autonomy of IRAs<sup>48</sup>. Silva<sup>49</sup> has argued that because the responsibility for economic performance and outcomes is that of the executive arm, a democratically elected President will desire to determine the tariffs and quality of services especially in utilities. For example, after the change of government in 2003 President Lula complained many times “that it was unacceptable for an elected President, who has to be accountable to the population, to have less power than a director appointed for a five-year term that cannot be removed from office.”<sup>50</sup>

The US model of regulatory governance has mitigated the above challenge faced by the Brazilian governments in seeking to control IRAs through the instrumentality of the Administrative Procedure Act. This legislation acts as a barometer for ensuring that all regulations and rulings of IRAs in USA pass the legitimacy test. That in turn ensures what Batista refers to as the “homogenization” of these agencies in order to introduce harmony and synergy in government policies.<sup>51</sup> The practice that has crystallised is that an IRA must first demonstrate the reasonableness of an order or ruling, its cost-effectiveness as well as the buy-in of relevant stakeholders before such a determination can take effect.<sup>52</sup>

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<sup>48</sup> Examples of this include the administrative control via hierarchical appeal; Federal Court of Accounts control over IRA accounts.

<sup>49</sup> Silva, note 16.

<sup>50</sup> Luiz Carlos Bresser-Pereira, *Folha de São Paulo*, August 13, 2007 in Vasconcellos, note 24.

<sup>51</sup> Batista, note 15 at 14.

<sup>52</sup> *Ibid.* at 15.

Seventhly, the desire for synergy within government is yet another incentive for intervention by the executive arm in the affairs of IRAs. As the executive arm is responsible for the development and implementation of economic policies, the need arises to ensure synergy and cohesion in the evolution of economic policies towards the overall developmental objectives of government. Where there is a potential for overlaps and conflicts between those policies and regulatory determinations of IRAs, especially touching on macroeconomic and social policies being implemented by government, governments in Brazil have always intervened to curtail the powers of IRAs.<sup>53</sup>

Eighthly, the existence of a Federal Court of Accounts (**Tribunal de Contas da União. TCU**) within the Brazilian political system introduced a dimension that has been argued to be a case of institutional overlap occasioned by the Federal Constitution that portends conflicts and the undermining of the autonomy granted IRAs. Under the Federal Constitution, the TCU is the body empowered to consider the merits of administrative actions and to assess the economic validity of decisions of the IRAs. The role of the TCU covers three areas: financial and budgetary audit, analysis of the administrators' accounts, and opinion on the provision of Executive's annual accounts. It has been argued that the structure of the court lends itself to political influences as the court does not have the technical wherewithal to perform audits on IRAs in the performance of its highly technical areas. This control by the TCU raises issues that relate to the sanctity of the IRA independence and may actually be considered as a provision that conflicts with the IRA model of regulation.<sup>54</sup>

Still on the scope of the TUC oversight powers, is the potential, if not the actual presence, of institutional overlap within the Brazilian regulatory trajectory given the oversight powers over IRAs. This apparent overlap portends regulatory uncertainty

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<sup>53</sup> Silva, note 16 at 40-41; Vasconcellos, note 27 at 21.

<sup>54</sup> Vasconcellos, note 27 at 24-26.

and confusion. From simply providing audit oversight on IRAs, the TUC has assumed oversight powers of reviewing the purely technical ruling and decisions of IRAs.<sup>55</sup>

Ninthly, the institutional weaknesses in the judicial system have undermined the effectiveness of the IRA model in Brazil. The track record of the Brazilian judicial system is poor especially as regards the upholding and enforcement of property rights. Inordinate delay in the determination of commercial disputes and a winding and complicated civil procedure has been the face of the Brazilian judiciary. The respected Financial Times of London, had in a frontline article, noted the dysfunctional state of Brazil's judiciary which has come to be seen as an impediment to national development. The article noted that the judiciary:

allows debtors of all kinds to abscond at will, knowing that none but the most determined of creditors will pursue them through the courts. It forces banks to lend at astronomical rates of interest because they cannot foreclose on debts. More worryingly, it means that vital infrastructure projects are stalled because investors cannot be sure the judiciary will uphold their rights.<sup>56</sup>

Pinheiro<sup>57</sup> in a study of the Brazilian judiciary opined that the mediocre quality of laws and the many veto points inherent in it are partly to blame for the compromised application of justice. On the other hand, Saddi and Faria have shown that the formal structure of the law, especially as regarding the many procedural layers and formalities that litigants must surmount, has rendered the judicial system to be "fragmented and

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<sup>55</sup> Eduardo Magalhães, G.G., *The independent regulatory agencies and the Federal Court of Accounts: a jurisdictional conflict?* Journal of Public Administration, Rev. Adm. Pública vol.40 no.4 Rio de Janeiro July / Aug. 2006; GOMES, M.B, *External control of regulatory agencies in Brazil in comparative perspective: lessons, recent events and future challenges*, In: INTERNATIONAL CONGRESS ON DEL CLAD LA REFORMA DEL STATE Y DE LA ADMINISTRACIÓN PUBLIC, 8. *Annals ...* Panama, May. 2003

<sup>56</sup> Financial Times. *Why Brazil's judicial system is driving the country nuts*. Author: Jonathan Wheatley, 24 May 2005.

<sup>57</sup> Pinheiro, A., *Reforma do Judiciário: planos, propostas e perspectivas*. Rio de Janeiro: Booklink Publicações, 2003.

hardly systematized.” This has made the responsiveness of the judiciary to be sluggish without meeting the ends of justice.<sup>58</sup>

Tenthly, Batista<sup>59</sup> argues that even though the Brazilian IRAs are tailored after the US model, there has been a failure in developing the participation procedures that grant legitimacy to the decisions there. Public participation in the regulatory process accords transparency and legitimacy; and allows for a buy-in of all relevant stakeholders upon whom regulatory decisions would have impact. Batista further notes that as at spring of 2014, only ANEEL, the electricity regulator, had established a methodology and developed processes and procedures for holding activity hearings and public consultations, in addition to the public meetings of the Board of Directors. This is just one out of the ten IRAs established.

This lack of public participation has led to an erosion of public support for decision-making processes of the IRAs, thus opening up the floodgates for court actions that impugn the legitimacy of IRAs.<sup>60</sup>

Given the centrality of property rights protection to the survival of the IRA model, the dismal state of the judicial system has a major impact on economic growth, and by extension the effective functioning of IRAs.<sup>61</sup>

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<sup>58</sup> Saddi, J., *The connection between the judiciary and credit as an instrument of national development: the case of Brazil*, Centre for Brazilian Studies, University of Oxford, Working Paper Number CBS-82-07, 2007; Faria, J.E., *Direito e Economia na Democratização Brasileira*. São Paulo : Ed. Malheiros, 1993.

<sup>59</sup> Batista, note 15 at 16.

<sup>60</sup> The Brazilian Associations of Infrastructures and Basic Industries’ Report of 2008 notes that the number of court actions against IRAs relating to their regulatory mandates had increased in the past years. The Federal Court of First Region had already 1,754 process around July 2008 about themes that involve all the 7 federal agencies linked to infrastructure field, as such as ANEEL, ANATEL, ANP, ANTAQ, ANTT, ANA and ANAC. No study has been accessed with more current figures. Source: Batista, T.C., *Control of the normative power of the regulatory agencies by the Judicial Branch*, George Washington University - School of Business, Center for Latin American Issues, The Institute of Brazilian Issues, The Minerva Program, Washington – DC, Spring 2014, Appendix B.

<sup>61</sup> Pinheiro, A.C., *O judiciário e a economia: evidência empírica para o caso brasileiro*, in *Judiciário e Economia no Brasil*, 2000, edited by Armando C. Pinheiro, Sumaré in Goldstein and Pires, Esta publicação é parte da Biblioteca Virtual de Ciências Humanas do Centro Edelstein de Pesquisas Sociais – [www.bvce.org](http://www.bvce.org).

The Brazilian experience underlines five challenges developing countries face in setting up IRAs within the context of weak institutional endowments.

First, the Brazilian experience shows that the state of a nation's political economy is a major factor constituting impediments to institutional reforms in developing countries.<sup>62</sup> Political economy here refers to the interplay of political institutions, the political environment, and the economic system influence each other within a nation state. In the Brazilian context, a long period of military rule laid the foundation of a centralized command-like leadership structure where power flows from the top to bottom with little or no lower-up inputs. This constrains citizens' participation in policy evolution thus denying policies acceptability and legitimacy. The transplanting of the IRA into the Brazilian mix without public participation and buy-in is a case in point.

Second, the Brazilian case highlights the dangers of adopting an "overly idealized view of the way the transplanted legal system operates in the country of origin"<sup>63</sup> and it occurred in Brazil. Transplanting models from other climes for the simple reason that they have worked there and expecting them to equally work in the same manner in a developing country is too simplistic an idea. A deliberate attempt at calibrating it to local conditions and particularities is desirable.

Third, cultures that have a long history of authoritarianism and military rule tend to have a militarised response to reforms, and a suitable foundation needs to take in place before institutional reforms such as IRAs that require democratic concepts such as separation of powers and the rule of law to succeed are introduced. Military rule in

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<sup>62</sup> Prado, note 17 at 503; Vasconcellos, note 28. See also the Comments of Prado that "If the President will be held electorally responsible for what the agencies are doing, he has strong incentives to try to influence them to implement popular policies. For example, the President could try to make the agencies reduce the electricity rates for residential consumers, given that electricity rates have been historically determined by the Executive branch and are likely to be perceived as the president's responsibility even after privatisation.": Prado, M., *Institutional reforms, legal transplants and political systems*, paper presented at SELA Conference, June 2007 at 10-11.

<sup>63</sup> Ibid at 442.

Brazil had a hierarchical system whereby power did not devolve from the very top of the leadership to the bottom. The autocratic leadership was inimical to democratic-friendly cultures such as public discourse, ventilation and due consideration of alternative viewpoints, a vibrant press, and civil society organizations. These did not thrive in a manner to assist in the evolution of people centred programmes in the Brazilian context.

Four, the outcome of reforms in developing countries has a lot to do with the political will and personality of the head of government. This brings into focus the argument of the primacy of leadership over institutions in Nigeria. Prado makes the point that the reforms in Brazil that institutionalised the IRA model were not feasible until the emergence of a strong President that possessed and displayed a strong political will to see through the reforms.<sup>64</sup>

Five, the rise in the number of court actions against IRAs in Brazil points to a major failure of its umpire role in Brazil's political economy. It can be safely argued that the multiplicity of law suits is an indication of the IRAs' inability to balance the contending interests of all the players in its regulatory space and value chain. This portends regulatory conflicts and uncertainty and belies the lack of the effective institutionalisation and stabilisation of IRAs in Brazil's political trajectory.<sup>65</sup>

The lessons drawn from the Brazilian context in its attempt at instituting IRAs point to the challenges that developing countries need to dwell on before adopting the model. A consideration of the contextual endowments and limitations of the nation should be an overriding factor in a quest to institute foreign models that have worked elsewhere but may have local challenges.

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<sup>64</sup> Prado, note 17.

<sup>65</sup> Batista, note 15.

#### 6.4 Legal and Regulatory Framework of Independent Regulatory Agencies in Ghana

Prior to the reforms in the 1980s, all the essential utilities in Ghana were in the hands of government as SOEs. This was because of their monopolistic characteristics and the large financial resources required for owning and managing them. Private investors nursed fears borne of a lack of a suitable climate to permit the recovery of investments.<sup>66</sup> By the 1980s however, these SOEs were suffering from mismanagement, poor operational performance and distorted tariff structures that resulted in poor service delivery and the near absence of essential utilities to a large section of society. The government used this as a rationale to seek private sector through participation and investment through privatisation. This gave rise to the evolution of a new legal and regulatory framework to deal with the entry of the private sector into the erstwhile wholly owned public utilities.

The institutional design of IRAs in Ghana, like in Brazil, did not have the benefit of stakeholders' participation in the formulation of its underlining principles, goals and outcomes to the nation. There was therefore no concerted engagement and acceptance of the new policy thrust particularly from two critical stakeholders in the value chain: the regulated entities and the consumers.<sup>67</sup>

What gave the final impetus to the economic reforms were the public protests that broke out in 1997 against a 300% price increase in services by the two electric power utilities, the Electricity Company of Ghana (ECG) and Volta River Authority (VRA), ostensibly as a part of the reforms measures that were promoted by the World Bank. As a result, the government of Ghana stepped in, first to suspend the price

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<sup>66</sup> Aryeetey, E. and Ahene, A.S., *Utilities Regulation in Ghana*, Centre on Regulation and Competition Working Paper Series, Paper No. 111, June 2005.

<sup>67</sup> Ibid.



increases and then went ahead to set up two IRAs in the utilities sectors to regulate the provision of water, telecommunications and electricity.<sup>68</sup>

While the Public Utilities Regulatory Commission (PURC) and Energy Commission (EC) were established in 1997 to regulate the provision of water and electricity, the National Communications Authority (NCA) was set up to regulate telecommunications. The purview of EC extended to the regulation of petroleum and gas.<sup>69</sup> PURC is considered an economic regulator in charge of tariff setting, performance monitoring, promotion of competition and complaints handling, and the EC known as the technical regulator was primarily responsible for licensing, technical standards and performance monitoring, in addition to serving as a policy advisory organ of the Energy Ministry.<sup>70</sup>

Even though the IRAs in Ghana were set up about the same time, their institutional features varied from sector to sector. It is an open question as to whether the institutional design of IRAs in Ghana is in alignment with the international best practices tests of credibility, legitimacy, and transparency.<sup>71</sup> It has been argued by Kapika and Eberhard<sup>72</sup> that in terms of the allocation of powers, the two utility regulators meet the standard of best practices for effective regulation. This argument appears to be oblivious to the several limitations in the power architecture and design of the Ghanaian IRAs.

Firstly, in terms of possessing the requisite institutional powers that are consistent with international best practice,<sup>73</sup> the EC Act does not give it such powers as

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<sup>68</sup> Ibid.

<sup>69</sup> Kapika and Eberhard, note 8.

<sup>70</sup> Ibid.

<sup>71</sup> Brown, note 5.

<sup>72</sup> Kapika and Eberhard, note 8 at 214-215.

<sup>73</sup> Brown, note 5.

it is merely an advisory body.<sup>74</sup> This is further highlighted by the Ministerial powers mandating the Minister to give directions to the Commission.<sup>75</sup> In the case of PURC, even though the PURC Act stipulates that “the Commission shall not be subject to the direction or control of any person or authority in the performance of its functions” the Minister of Energy is on record as having categorically stated that as long as PURC derives funding from the state treasury, it cannot be considered an independent body.<sup>76</sup>

Secondly, with respect to the adequacy in the clarity of roles and responsibilities between the IRAs and the other players within their regulatory space, it is submitted that vesting similar powers in two IRAs within the same regulatory space in a developing and immature political environment such as Ghana’s is an open invitation for turf wars; and the accompanying confusion can only be avoided where careful coordination among the IRAs is maintained. Thus, the prevailing concerns of regulatory overlaps and uncertainty may not be unfounded.<sup>77</sup>

Thirdly, in terms of financial independence, while the EC derives most of its funding from the Energy Fund that is controlled by the Finance Ministry, PURC has four major sources of funding including government subventions, loans and grants and internally generated funds, the first source being the primary one. Thus, both the EC and the PURC depend almost wholly on budgetary funding streams from the state treasury. This has impacted negatively on their independence, capacity and legitimacy.

For example, over the 10-year period from 1999 to 2008 the approved budget of PURC was on average 47% lower than the amount proposed by it.<sup>78</sup> This in turn has led

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<sup>74</sup> Kapika and Eberhard, note 8 at 213.

<sup>75</sup> Section 3.

<sup>76</sup> Kapika and Eberhard, note 8 at 214.

<sup>77</sup> Ibid at 214 – 215 and 232.

<sup>78</sup> PURC noted in its second annual report (1999) that “funding constraints still remain a problem due to the rather arbitrary ceiling imposed on the Commission’s budget proposals submitted to government for approval. Inevitably, the budget fell short of what was required to sustain the Commission’s programs”.

to unattractive remuneration packages which do not attract the best professionals needed.<sup>79</sup>

Fourthly, touching on administrative and functional independence, Commissioners in both EC and PURC are liable to be removed from office by the President on the occurrence of four events, one of which is for “any just case”.<sup>80</sup> This raises serious questions of arbitrariness and the possible exercise of discretion without verifiable parameters. Regarding staffing, both the EC and PURC Acts<sup>81</sup> give the President the power to appoint officials and employees of the Commission acting on the advice of the Commission. On a last note, the EC Act allows an aggrieved party to appeal against a decision of the EC to the Minister thus undermining the autonomy and legitimacy of the regulator.<sup>82</sup>

It can thus be surmised, contrary to Kapika and Eberhard’s position above, that IRAs in Ghana lack the requisite institutional powers to carry out their functions.

The review of the legal and regulatory framework for IRAs in Ghana above indicates several challenges.

- a) The establishment of IRAs was not carried out with deliberation but as a hasty reaction to public protests. The manner it was done (out of compulsion mainly to satisfy donor requirements and not as an institutional innovation meant to address the concerns of consumers) did not allow for an informed discussion of its desirability and relevance as the template that best met the state of Ghana’s political economy and peculiar characteristics.<sup>83</sup>

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<sup>79</sup> A 2010 amendment to the PURC and EC laws seeks to ameliorate the situation. See Kapika and Eberhard, note 8.

<sup>80</sup> Ibid at 219.

<sup>81</sup> Section 34(2 and 2) of PURC Act and Section 46(I and 2) of the EC Act.

<sup>82</sup> Kapika and Eberhard, note 8 at 222.

<sup>83</sup> Aryeetey and Ahene, note 66 at 1.

- b) The relevance of the political economy in crafting a suitable regulatory template for a nation is brought to the fore in the Ghanaian context. Ghana has had a long history of brutal military dictatorships that abridged the culture of civil engagement and communication in favour of a militarized society. This tendency manifested in the lack of a robust public engagement of the new regulatory template before its adoption by government. The IRA model was taken as a given and therefore suitable, having been presented by intermediating agencies.
- c) The duplicity in functions and roles portend overlaps that are open to conflicts and regulatory uncertainty. A case in point is that while PURC has the powers to set tariffs and monitor technical standards, it lacks the powers to license entry into its regulatory space as the powers reside in EC. This has constrained PURC from monitoring and enforcement. Similarly, too the hands of EC are tied as it is not empowered to monitor technical standards.<sup>84</sup>
- d) Achieving a full cost-reflective tariff has proven a herculean task because of consideration of the needs of the poor in society. Government pro-poor policy influences regulatory actions, thus curtailing the independence of the regulator through active influence from the government.<sup>85</sup>
- e) There are inadequate investments as a result of a hastily crafted regulatory framework, and this has made the work of the IRAs difficult, especially in terms of rigidly enforcing licence terms and conditions and imposing penalties that could affect the already precarious financial positions of the utilities.<sup>86</sup>
- f) There is palpable lack of skilled manpower in the regulated sectors which translates to a dearth of professionals to populate the IRAs and fulfill their

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<sup>84</sup> Kapika and Eberhard, note 8, at 232.

<sup>85</sup> Ibid; Amenga-Etego, R., *Water Privatisation in Ghana: Still born or born deformed?* Advocacy and Campaign Programmes, Integrated Social Development Centre, (ISODEC), Accra-Ghana in Aryeetey and Ahene, note 66.

<sup>86</sup> Ibid.

mandates. This lack has affected regulatory independence, competence and neutrality.<sup>87</sup>

- g) Regulatory effectiveness is hampered by limitations in the availability and access to information and data on the economic and social parameters of national development. This in turn affects planning and effectiveness of the IRAs.<sup>88</sup>
- h) On the independence of the IRAs, the blanket powers give to the President in the enabling Acts setting up IRAs to remove a Commissioner for “any just cause” raises concerns of arbitrariness and have the potential of undermining the independence of the IRAs.<sup>89</sup> Further exacerbating the weakened state of IRAs in Ghana are the powers residing in the President to appoint staff the IRAs.
- i) In terms of financial independence, both the EC and the PURC depend almost wholly on budgetary funding streams. This, apart from limiting the ability of the IRA to act independently and in the adjudged best interests of the industry, makes it susceptible to influences of the quarters from which it derives its funding. This undermines the independence and legitimacy of the IRAs to act effectively and competently.
- j) The most significant constraint on the thriving of IRAs in Ghana, and indeed most developing countries is the wide information gap existing between providers of services and the users of those services. The information gap is engendered by the poverty of the users of services and their low level of education. When infrastructure service providers use advanced technology that is beyond the means of the majority of the users of the service either in comprehension or affordability, the regulator’s task of setting tariffs becomes extremely difficult to carry out meaningfully.<sup>90</sup>

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<sup>87</sup> Lafont, J.J., *Regulation and Development*, Federico Caffè Lectures, 2005, Cambridge University Press.

<sup>88</sup> Aryeetey and Ahene, note 66.

<sup>89</sup> Ibid.

<sup>90</sup> Aryeetey, note 3 at 45.

It can be seen therefore, that both Brazil and Ghana assimilated the IRA model under similar circumstances without any attempt at public involvement in its evolution. As a result, the model's implementation is undergoing turbulence and its future is at best hazy given the contextual challenges it faces in these countries.

This thesis will now consider the Nigeria reception of the IRA model and how it has fared so far and further juxtapose its institutional features and performance with its counterparts in Brazil and Ghana.

## 6.5 Legal and Regulatory Framework of Independent Regulatory Agencies in Nigeria

Until the 1980s, Government utilised SOEs as a vehicle to promote economic development and the provision of infrastructure and utilities. SOEs were established in virtually all the sectors of the economy with extensive monopoly powers to provide public goods and services and also in hard infrastructure such as transportation (rail, road, inland waterways, marine and air) oil (oil prospecting, exploration, refining and marketing), cement, fertilizer and motor assembly plants; steel, paper mills, telecommunication, postal system, electric power, banking and insurance sectors.<sup>91</sup> Social or soft infrastructures made up of schools and hospitals were included. A survey<sup>92</sup> showed that there were nearly 600 public enterprises at the federal level alone and an estimated 900 at the state and local government levels. By 1990, Nigeria possessed the largest SOE portfolio in sub-Saharan Africa.

Dwindling oil revenues and a global economic recession coupled with failure of the SOEs to attain the goals for their set up, led government, on the prompting of the intermediating agencies<sup>93</sup>, to commence structural adjustment economic reforms.

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<sup>91</sup> Haque, S., M, *Privatization in Developing Countries: Formal Causes, Critical Reasons, and Adverse Impacts*, 1 in Ali Farazmand (ed.) *Privatization or Public Enterprise Reform?* (Westport, Conn.: Greenwood Press, 2000) at 217-238.

<sup>92</sup> Zayyad, H.R, *Privatisation and Commercialization in Nigeria*, Bureau of Public Enterprises website, [www.bpeng.org](http://www.bpeng.org) Survey undertaken by the TCPC, a body set up by the FGNI to reform the public sector

<sup>93</sup> Dubash, N., *Regulation through the Back Door: Understanding the Implications of Institutional Transplant*, Working Paper No. 42, Jerusalem Papers on Regulation and Governance, March 2012 at 4.

A major plank of the reforms was the minimisation of the role of the state in the ownership of infrastructure and provision of services and the opening up of erstwhile public monopolies to private sector ownership and management through privatisation. With these reforms came IRAs as a model of regulatory governance that would balance the interests of all the players in the value chain.<sup>94</sup> IRAs were established in the telecommunications and the electric power sector while new ones are in the process of being set up in oil and gas, transportation, maritime and postal services.

This research will consider those already existing IRAs in the two utilities above as they match the precise contours of an IRA.

### **6.5.1 Telecommunications**

The telecommunications sector was grossly under-developed before deregulation in 1992 with the setting up of the Nigerian Communication Commission (NCC).<sup>95</sup> In spite of this, continued government ownership and management of the main service provider, Nigerian Telecommunications Limited (NITEL), constrained deregulation until 1999 when a new law, the Nigerian Communications Act 2003 (NCA 2003) strengthened the capacity of the NCC to function effectively as the IRA for the telecommunications industry.

#### *6.5.1.1 Institutional Characteristics, Requisite Powers, Clarity of Roles and Independence*

The NCA 2003 is the primary legislation that contains all the basic provisions that allow the NCC to operate optimally as an IRA for the sector.<sup>96</sup> The law spells out the functions of the NCC<sup>97</sup> and further clarifies and delineates the roles of all the other stakeholders in the sector including the line ministry<sup>98</sup>, the licensees<sup>99</sup> and the

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<sup>94</sup>Newberry, D., *Rate of Return Regulation versus Price Regulation for Utilities* in Kapika and Eberhard, note 8 at 9.

<sup>95</sup> The Nigerian Communications Commission Act, 1992.

<sup>96</sup> Section 1 and 2 of the NCA Act, 2003.

<sup>97</sup> Section 4 of the NCA Act, 2003.

<sup>98</sup> Sections 23 and 24 of the NCA Act, 2003.

<sup>99</sup> Sections 31 – 52 of the NCA Act, 2003.

consumer.<sup>100</sup> In addition, it specifies the procedures and powers<sup>101</sup> to be utilised in carrying out the functions, and grants the NCC the requisite powers including the powers to make regulations and bye laws that will allow it to effectively achieve its mandate.<sup>102</sup> The law also grants to the NCC the powers to hire its own staff,<sup>103</sup> a critical area where IRAs are often compromised as a result of low remuneration.

The clarity of roles provision is especially important in the Nigerian context considering the fact that prior to the reforms, government was the owner of the incumbent utility, NITEL, in addition to being the manager and provider of telecommunication services while simultaneously acting as the regulator for the sector. In the latter role, government determined the prices of services which were not cost reflective. In order for the private sector to have the assurances to invest, a level playing field had to be provided.

The extent of NCC's powers includes undertaking quasi-judicial proceedings to resolve disputes between licensees.<sup>104</sup> The nature of these powers would be of concern to separation of powers theorists who, as in the USA model,<sup>105</sup> argued that vesting IRAs with powers of arbitration and adjudication conflicts with that time-tested doctrine. While in the USA, this matter has been laid to rest by numerous judicial pronouncements,<sup>106</sup> in the Nigerian context, it remains an untested area. However, as it relates to powers to conduct public hearings of a civil nature by IRAs, the decision of the Nigerian Supreme Court in Garba Vs. University of Maiduguri<sup>107</sup> suffices. In that case, the court recognized the power of administrative bodies to conduct hearings.

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<sup>100</sup> Sections 104 – 106 of the NCA Act, 2003.

<sup>101</sup> Sections 53 – 67 of the NCA Act, 2003.

<sup>102</sup> Sections 70 – 72 of the NCA Act, 2003.

<sup>103</sup> Sections 15 and 16 of the NCA Act, 2003.

<sup>104</sup> Section 74 (1) of the NCA, 2003.

<sup>105</sup> Schoenbrod, D., *Power Without Responsibility, How Congress Abuses the People Through Delegation*, Yale University Press, 1993 at 30-31; Strossen, N., *Delegation as a Danger to Liberty*, *Cardozo Law Review* Vol.20:861 (1999); *Winthrop v. Larkin* 421 U.S. 35 (1975 ) 1532.

<sup>106</sup> Winthrop v. Larkin 421 U.S. 35 (1975 ) 1532; Wayman v. Southard, 23 U.S. 10 Wheat. 1 1 (1825); *Mistretta v. United States*, 488 U.S. 361 (1989).

<sup>107</sup> (1986) 1 NWLR (Part 18) 550.



Thus, while an administrative body may not hear criminal matters, it can hear matters in respect of civil conduct. The Supreme Court's recognition is also in line with the dictates of the 1999 Constitution which merely sets out the parameters for validity of administrative hearings by reference to adherence to rules of natural justice.<sup>108</sup>

#### 6.5.1.2 *Independence*

For an IRA to be able to function effectively and deliver on its mandate, it ought to have some degree of independence<sup>109</sup> in order to ward off both political and regulatory capture. This is done by maintaining an arms-length relationship with all players in the value chain. The NCA 2003 adequately provides for this in Section 25 (2):

In the execution of his functions and relationship with the Commission, the Minister shall at all times ensure that the independence of the Commission, in regard to the discharge of its functions and operations under this Act, is protected and not compromised in any manner whatsoever.

Furthermore, this insulation from control and influence takes several forms consistent with the best practices above, as follows.

- a) Regarding appointment and removal of Commissioners, the NCA 2003 provides that the President shall appoint, subject to the confirmation of the Senate. In addition, the tenure of IRA members cannot be abridged except on due cause and only upon being given a fair hearing prior to removal. This safeguards the tendency of regulators to take decisions that may not be in the best interest of the sector but rather to please their appointees. This protection is also contained in the legal framework of Brazilian IRAs though it is missing in the Ghanaian model.

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<sup>108</sup>Idigbe, A., *Quasi-Judicial Functions Of Regulatory Institutions – A Perspective From The Bench*, A Paper Presented on 17<sup>th</sup> July 2012 at the 2<sup>nd</sup> Seminar for Judges on Electric Power Sector 2012 held at the Amba Tinapa Hotel, Calabar, Cross River State, [www.punuka.com](http://www.punuka.com).

<sup>109</sup>Christensen, T., and Lægreid, P., 2006., *Agencification and Regulatory Reforms*, 2006 in *Autonomy and Regulation: Coping with Agencies in the Modern State*, edited by Tom Christensen and Per Lægreid. Cheltenham: Edward Elgar Publishing.

- b) The NCA Act also grants fixed terms for Commissioners but does not provide for staggered appointments unlike the Brazilian model. Staggered nominations mean that within one agency term, the terms of office of directors will not overlap. A system of staggered terms guarantees a higher degree of independence if it reduces or eliminates altogether overlapping nominations. This insulation seeks to fence off regulators terms from Presidential abridgement of tenures of Commissioner with electoral cycles in mind. Thus this aspect of protection and the related independence is missing in the Nigerian and Ghanaian model of IRAs but present in the Brazilian model.
- c) Another form of independence in the NCA 2003 is in the funding streams that are separate from the national treasury. This is amply provided for in Part 5 of the NCA 2003 and the NCC has been able to maintain its independence by relying on levies and fees derived from the regulated entities for its sustenance. The financial independence the NCC contrasts sharply with the Brazilian and the Ghanaian models. While in the Brazilian model, the protection exists on the books, the executive has in practice, devised ingenuous ways to circumvent it and require all budgets of IRAs to receive approval of the executive. In the Ghanaian situation, this insulation is totally absent and the performance and effectiveness of the IRAs has been undermined by dictation and interferences for the Executive arm of government.
- d) On operational and structural independence, the NCA 2003 is designed to make the NCC independent of external control and influence, by expressly requiring them not to take directives from any external bodies or persons except on policy matters.<sup>110</sup> In addition, the NCC has the powers to hire its own staff, determine remuneration levels and also to engage external consultants. This allows them

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<sup>110</sup> Section 25(2) of the NCA Act, 2003.

the ability to attract and retain qualified personnel.<sup>111</sup> This same power exists in the Brazilian IRAs but is absent in the Ghanaian model where the President has the powers to appoint officers into the IRAs.<sup>112</sup> This route, apart from undermining the independence of the IRAs in Ghana, has served to delay the appointment of even junior staff thus affecting the effective delivery of services.<sup>113</sup>

- e) Furthermore, the adoption of the collegial system of administration within IRAs which is a feature of the Brazilian model has also been transplanted into the Nigerian context, though it is missing in the Ghanaian situation. This is a system whereby decisions of the IRAs are arrived at by consensus among the body of Commissioners as opposed to a single individual. Where Commissioners take decisions in a group-setting, it limits the extent of internal interferences as it is easier to influence one director than it is to influence a commission that makes a decision under a collegial process.

#### 6.5.1.3 *Accountability*

As the powers of the IRA are delegated, there are built-in mechanisms in the NCA 2003 to hold the NCC accountable in the discharge of its functions and exercise of powers. These mechanisms are in two parts: first, the requirement that the NCC tables a report before the National Assembly detailing its activities in the preceding year alongside its audited accounts.<sup>114</sup> The second is in subjecting all its decisions to judicial review in the event of any party being aggrieved by them.<sup>115</sup> The legislative oversight power of the

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<sup>111</sup> Bresser-Pereira, L.C., (1998), *Reforma do Estado para a Cidadania: A Reforma Gerencial Brasileira na Perspectiva Internacional*. São Paulo: Editora 34/ENAP.

<sup>112</sup> Section 3 (1) and (2) of the PURC Act and Section 46 (1) and (2) of the EC Act.

<sup>113</sup> Kapika and Eberhard, note 8 at 219.

<sup>114</sup> Section 21 of the NCA Act, 2003.

<sup>115</sup> Section 86-88 of the NCA Act, 2003.

National Assembly allows it to inquire into the affairs of IRAs<sup>116</sup> which power exists both in the Nigerian and Ghanaian context.

#### 6.5.1.4 *Legitimacy, Transparency, Public Participation, Predictability*

Best practice<sup>117</sup> requires that the regulatory systems and processes must be fair and impartial and open for public participation. Even though this can be achieved in different ways, as a general rule, all those to be affected by regulatory decisions must have prior notice of the impacts and the opportunity to be heard in order to ventilate their views before a decision can be arrived at by the IRA.

Sections 57 – 67 of the NCA 2003 detail the procedures to be undertaken by the NCC in its interface with stakeholders. The full import of these provisions is that the public ought to be involved in and consulted prior to the determination of any regulatory direction or any change thereof and whatever decisions that are arrived at must be in a recorded form that contains the basis for the decision and is open for the public to access. This encourages public participation, transparency and legitimacy in the whole regulatory process.

#### 6.5.1.5 *Performance of Telecommunications Sector*

The performance of the telecommunications industry since the establishment of the NCC as a fully-fledged IRA, when compared with what was obtained prior to the reforms, indicates major improvements.<sup>118</sup> However, Nigerians continue to clamour and complain about the poor quality of telecommunications services, a situation which puts the NCC as the regulator in a dim light.<sup>119</sup> More pointedly, there have been muted complaints of industry capture by the regulated entries owing to the lack of

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<sup>116</sup> Vasconcellos, note 27 at 30.

<sup>117</sup> Brown, note 5.

<sup>118</sup> Ndukwe, E., *The Role of Telecommunications in National Development*, 2004, a speech presented at the 19th Omoyale Annual Management Lecture on Friday, December 5, 2003, at Chartered Institute of Bankers Auditorium, Victoria Island, Lagos; <http://www.ncc.gov.ng/>

<sup>119</sup> Olumide, H.A., *Telecommunications Reforms and Effects of Competition on Availability, Quality and Cost of Services in Nigeria*, Public Policy and Administration Research, [www.iiste.org](http://www.iiste.org), Vol. 1, No 3, 2011

improvement in services and the apparent helplessness of the NCC, even though these complains have so far not been substantiated.<sup>120</sup>

The overview of the legal and regulatory framework in the telecommunications sector indicates certain institutional limitations in the design of the framework. This has given rise to some emerging challenges to the successful implementation of the model in Nigeria:

- a) Even though there are adequate safeguards securing the tenure of Commissioners within the NCC, government, as a part of its overreaching and illegal steps, recently purported to remove a Commissioner before the expiration of his tenure without giving him a fair hearing in accordance with the NCA 2003. The courts held the removal to be unlawful.<sup>121</sup> This underlines the thin line between independence from and influence of the government.
- b) There have been incidences of overt interference in the discharge of the NCC functions by government acting through the line Minister. One instance which readily comes to mind is that in 2008 the NCC, through an auction, awarded three 3GHz spectrum licenses to three companies: Mobitel, Multilinks and Spectranet. The Minister ordered the cancellation of the award alleging that the entire process was tainted by corruption and lacked due process. In reaction, one of the licensees went to court, in the case of Mobitel Vs Minister of Information & Communication, and 2 others to challenge the Minister's action and the court held that the Minister's intervention was unlawful.<sup>122</sup>

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<sup>120</sup> Industry capture involves the control of regulation by parties not pursuing the public interest.

<sup>121</sup> *Gwandu v President Federal Republic of Nigeria and Attorney General of the Federation*, (unreported). Suit No. NICN/ABJ/23/2012

<sup>122</sup> Suit No. FHC/ABJ/M/312/09/CA/A/117/10, *Mobitel v Minister of Information & Communication, and 2 others.*

- c) Allegations of regulatory capture by the regulated entities have continued to test the regulatory process in the light of the poor services rendered and the inability of the NCC to enforce its licence terms to improve service delivery.<sup>123</sup>

### 6.5.2 Electricity

Prior to the reforms in the sector, government was responsible for policy formulation, regulation, operation, and investment in the Nigerian power sector. Regulation of the sector was done by the Federal Ministry of Power while operations were undertaken by the National Electric Power Authority (NEPA), a SOE responsible for power generation, transmission and distribution.<sup>124</sup> The overlapping roles coupled with the poor performance of the incumbent provider, NEPA, made the availability of power an essential commodity that was rarely experienced, with power supply hovering between 3000 and 4000 megawatts for a country of over 160 million people.<sup>125</sup>

As a result, government passed the Electric Power Sector Reform Act of 2005 (EPSRA 2005) which established the Power Holding Company of Nigeria (PHCN) and subsequently unbundled it into 18 successor companies. The reform objectives included the transfer of management and financing of successor companies operations to the private sector; the establishment of an IRA to regulate the entire industry; and the delineation and restriction of the role of government in the industry to policy formulation and long-term development of the industry. With these in place, the projection was that it would lead to increased access to electricity services; improved efficiency, affordability, reliability and quality of services; and higher outlay of investment into the industry to stimulate economic growth and development.<sup>126</sup> Since

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<sup>123</sup> Olumide, note 119.

<sup>124</sup> Nigeria Electricity Privatization Project. <http://www.nigeriaelectricityprivatisationproject.com> accessed on 1/8/15 at 10.10a.m.

<sup>125</sup> Adaralegbe, B., *Foreign Private Participation in the Electricity Sector of Developing Countries: What Works? An Examination of Nigeria's Electricity Sector*, The Journal of World Investment & Trade, 2009, Volume 10, Issue 2, 269 – 295.

<sup>126</sup> Nigeria Electricity Privatization Project, note 124.

then, the sale of the 18 successor companies has been carried out and a competitive market in the electricity market is imminent with the private sector leading.

#### 6.5.2.1 *Institutional Characteristics, Requisite Powers, Clarity of Roles*

The EPSRA 2005 establishes NERC as an independent technical and economic regulator (IRA) for the entire industry. The functions of NERC include, but are not limited to, promoting competition and private sector participation, when and where feasible; establishing or, as the case may be, approving appropriate operating codes and safety, security, reliability, and quality standards; establishing appropriate consumer rights and obligations regarding the provision and use of electric services; and licensing and regulating persons engaged in the generation, transmission, system operation, distribution, and trading of electricity. In addition, NERC is empowered to approve amendments to the market rules; monitor the operation of the electricity market; and undertake such other activities which are necessary or convenient for the better carrying out of or giving effect to the objects of the Commission.<sup>127</sup>

#### 6.5.2.2 *Independence*

The depth of the legal independence the law grants to the telecommunications regulator, NCC, is lacking in the electricity industry.<sup>128</sup> The EPSRA 2005 does not make explicit provisions safeguarding the independence of NERC from ministerial interference; rather there are copious references empowering the Minister to give directions to the regulator on matters related to the industry.<sup>129</sup>

On operational independence, the EPSRA 2005 grants to the NERC the power to hire its own staff. The appointment and discipline of Commissioners is made the prerogative of the President but subject to confirmation of the Senate.

On financial independence, even though the EPSRA 2005 allows the NERC to earn revenue from fees, charges, levies and other income from regulated entities within

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<sup>127</sup> Section 32 (2).

<sup>128</sup> Section 25(2) of the NCA Act.

<sup>129</sup> Sections 24 (2), 27,28,29,33, of the EPSRA 2005.

the industry in addition to the funds appropriated by the National Assembly, the reality has been that the NERC has relied almost wholly on appropriations for its work. It is only recently that the Commission was removed from the recurrent budget as the result of the increase in its locally generated income following the privatisation of the unbundled successor companies in 2003 and 2004.

#### 6.5.2.3 *Accountability*

The NERC is made accountable in several ways for the performance of its duties under the EPSRA 2005. Sections 51, 55, 56 and 59, 82 obligate the NERC to render periodic reports to the Minister on its activities and financial affairs including budgets. In addition, the EPSRA empowers NERC to present quarterly reports to the President and National Assembly on its activities.<sup>130</sup> Noteworthy too is the judicial oversight that NERC has been subjected to. The decision of the High Court in the case of PHCN & Ors v. NERC<sup>131</sup> further reinforces the accountable nature of the powers of NERC to courts of law as all its decisions are subject to appeal and review by any aggrieved party.

#### 6.5.2.4 *Legitimacy, Transparency, Public Participation, Predictability*

Sections 47 – 50 grant NERC the powers to conduct public hearings and review its decisions on the application of an aggrieved party within its regulatory space. However, a close reading of the provisions indicates that the powers of NERC to conduct quasi-judicial hearings have been circumscribed by the ambiguous wording of the EPSRA 2005 and a prevailing court decision in PHCN & Ors v. NERC<sup>132</sup> unlike the case of the NCA Act.<sup>133</sup> In the NCA Act, an aggrieved party cannot approach the court until it has exhausted the internally conducted processes of NCC.<sup>134</sup> However, in the case of NERC, a party can approach the courts without recourse to NERC.

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<sup>130</sup> Section 32 (1)(g).

<sup>131</sup> Unreported Suit No. FHC/ABJ/CS/35/09/08.

<sup>132</sup> Ibid.

<sup>133</sup> Section 88(3) provides that a person shall not apply to Court for a judicial review unless he has first exhausted all other remedies provided under NCA. This provision was affirmed by the Court in the case of *N.C.C. V. M.T.N.* 2008 (1086) 229.

<sup>134</sup> Section 88 (3) of the NCA.



In the PHCN case above, a petition was filed before NERC on a Power Purchase Agreement. The Applicants challenged the jurisdiction of NERC on the ground that there was an arbitration clause in the agreement. NERC ruled that it had jurisdiction to entertain the matter and the Applicants filed an application for judicial review at the Federal High Court, urging the court to quash the ruling of NERC and to stay further proceedings of NERC. The Court held that NERC had no power to entertain the petition in view of the arbitration clause and that section 50(1) of the EPSR 2005 was not mandatory but optional. In other words, NERC does not have exclusive jurisdiction or powers to hear disputes within its purview as of first instance and a party is at liberty to seek judicial review of the decisions of NERC without reference to the latter. Clearly this decision restricts the powers of NERC to regulate licencees within its regulatory purview as well as abridging its quasi judicial power.<sup>135</sup>

This development, known as “forum shopping” in legal parlance, has allowed persons to pick and choose which court or forum they consider would best deal with their complaints as against the express powers of NERC in the enabling law. With the rampant cases of corruption indicated earlier in this thesis, a veritable window has been opened to subvert the jurisdiction and powers of NERC.

An overview of the legal and regulatory framework of the electric power sector points to distortions in the structure of the NERC and a lack of independence flowing from government interference.

- a) The wordings of the EPSRA 2005 does not make explicit provisions safeguarding the independence of the NERC from Ministerial interference; rather there are copious references empowering the Minister to give directions to the NERC on matters relating to the industry. This in practice has undermined the independence of the NERC, and the line ministry has continued to attempt to influence and dictate to the IRA as a result of the weak legal framework.

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<sup>135</sup> Idigbe, note 108.

- b) Despite the clarity of the roles in the EPSRA 2005, a new law was recently passed setting up another technical regulator “Nigerian Electricity Management Services Authority for the industry.”<sup>136</sup> The implication is that, all the powers of the NERC that relate to technical regulation and enforcement will be excised and warehoused in the new regulator. The collateral effect of the new law will be a lack of clarity of roles, functions and powers in the industry with roles overlapping and functions clashing between two agencies of government over the same area of coverage. In addition, it will inevitably introduce regulatory uncertainty in the market and is capable of sending worrying signals to the investing private sector on policy somersaults and changes. This would inevitably have the real potential of depressing further investments in the sector.
- c) Even though the appointment and removal processes have been clearly specified in the EPSRA 2005, government in 2009 purported to suspend all the NERC Commissioners on allegations of corruption without following the process enshrined in Section 38 of the EPSRA 2005. It is noteworthy that the courts struck down the suspension and removal from office as unlawful and government entered into an out of court settlement that determined the matter amicably.<sup>137</sup>

#### 6.5.2.5 *Legality of NERC Decisions*

The period since the electricity regulator, NERC started regulating the market fully (in 2003) when the unbundling and sale of the state monopoly utility company was consummated to date is too short to make a conclusive determination on its regulatory effectiveness. However, it is instructive to note that within this short period there has been a major tumult in the market owing to the increase in tariffs within the framework of poor and intermittent supply of power to consumers.

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<sup>136</sup> The National Assembly in May 2015 passed a law to establishing Nigerian Electricity Management Services Authority (NEMSA) as a technical regulator in the electricity sector.  
<https://www.nassnig.org/nass2/legislation.php?id=2110> .

<sup>137</sup> Suit No.FHC/ABJ/CS/295/09, Dr. Muhammed Alimi Abdul-Razaq and the Attorney General of the Federation and 7 others.

There has been a torrent of court cases filed against NERC<sup>138</sup> that relate to and touch on its powers to regulate tariffs. While the court cases are yet to be determined, there is a discernible pattern in them all: the lack of or inadequate engagement with and consultation by NERC with stakeholders. This is clearly against the provisions of Section 46 of the EPSRA 2005.<sup>139</sup> This makes the case for a re-evaluation of NERC's procedures and processes to make them amenable for stakeholders' input in consonance with the EPSRA 2005.

## 6.6 Summary of Comparative Analysis

On a consideration of the international best principles upon which the IRA model of regulatory governance was conceived<sup>140</sup> it is evident that it requires a stable political system that recognises and adheres to the principles of Separation of Power, Rule of Law, democratic tenets and due process.

The discernible success of the IRA model within the USA is situated within the context of her long years of democratic maturity that has nurtured institutions to maturity. At the heart of this success has been the respect for and adherence to the separation of powers and the rule of law doctrines. In this way, the different arms of government work in synergy to achieve common purposes and even where overreaching tendencies emerge from any one arm of government, they are mitigated

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<sup>138</sup> Suit No: FHC/L/CS/438/2015: Phoenix Steel Mills Limited and 4 Others Vs NERC and 11 Others; FHC/L/CS/1040/15: Nigerian Bottling Company PLC (a.k.a. Coca-cola) and 4 Other Vs NERC and 11 Others; Suit No: FHC/L//CS/960/15: 1004 Estates Ltd & Anor Vs. NERC and 3 Others; Suit No: FHC/OW/CS/94/2015: Nweke Ishmeal and 2 Others Vs NERC and 3 Others; **Suit No:** FHC/L/CS/768/15: Toluwani Adebisi Vs NERC.

<sup>139</sup> S. 46 states NERC " may hold a hearing of any matter, which under this Act or any other enactment is required or permitted to conduct or on which it is required or permitted to take any action and the Commission shall hold public hearing on matters which the Commission determine to be of significant interest to the general public." and "Where the Commission is required to, or otherwise decides to, hold a hearing, all persons having an interest in such matter shall, as far as reasonably practicable, be notified of the questions at issue and given opportunities of making representations if they so wish."

<sup>140</sup> Regulatory governance refers to the design of the regulatory environment: legal and institutional framework, clarity of roles and objectives, resources available to the regulator and issues relating to regulatory commitment, independence, accountability, transparency, participation and legitimacy. See Eberhard, A., paper prepared for the World Bank Conference *Towards Growth and Poverty Reduction: Lesson from Private Participation in Infrastructure in Sub-Saharan Africa*, June 6-7, 2005, Cape Town, South Africa.

and reined in by other arms of government that have learnt through years of experience to secure and protect their constitutionally allotted turfs. This rich history of experience anchored upon strong institutions and tempered by a robust respect for democratic ethos which has stood the USA in good stead is what is glaringly lacking in the reviewed jurisdictions and Nigeria.

A discernible pattern evident in the way the IRAs have fared in the countries reviewed and in Nigeria displays certain trends:

- a) The political economy of a nation is a necessary factor to consider in the reception of the IRA model especially in the context of long histories of military dictatorships and authoritarian rule. These nations tend to have volatile and fragile institutions that elevate men above institutions. Rule of Law considerations are often in short supply. The political economy of a nation therefore ought to be a major factor in designing IRAs.
- b) Regulation of utilities and the institution of IRAs have a higher degree of credibility and legitimacy within political climes such as the USA that have a mature in-built system that restrains and restrains the arbitrary use of discretionary powers by political actors against the IRAs. These maturity and in-built mechanisms or restraint are lacking in the reviewed countries and Nigeria.
- c) Transplanting institutional templates such as IRAs that have existed and matured in developed nations into immature developing economies without minding the pitfalls that the mature nations had gone through, sets up the developing countries to make the same mistakes, often with disastrous consequences.<sup>141</sup>
- d) Major information asymmetry trail the regulatory landscape of the reviewed nations as a result of the low illiteracy levels and the tendency for service

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<sup>141</sup> Trebilcock M.J., and Prado, M.M., *An Advanced Introduction to Law and Development*, Elgar Advanced Introductions, 2014, Edward Elgar Publishing Limited, INC, USA at 55.

providers to capitalise on these to maximise profits and abuse customer rights and interests in the process.

- e) Political will and leadership matter a great deal in the design of IRAs in developing or weak democracies. Typically, the delegation of powers to IRAs is engendered by the willingness of both the executive and the legislative arms to share some of its powers with IRAs for the purpose of securing credible and technically balanced regulatory decisions and outcomes. Where the culture of hoarding power and over-centralising decision-making processes at the top layers of government predominates as it had in the reviewed countries, the necessary will is lacking.
- f) In spite of clear provisions insulating IRAs from external interferences, governments in the reviewed countries have on several instances arbitrarily removed IRA members who were thought not to be in the good books of governments. Government has in addition been seen to have openly and overtly interfered in the day to day management and discharge of the IRAs' mandate.
- g) With the Nigerian context in mind, despite the establishment of IRAs in the telecommunications and electric power sectors, quality of services has not being positive. For telecommunications, the penetration and accessibility has greatly improved. The electricity sector has however been bedevilled by deteriorating service delivery, power outages and a dwindling new customer base as a result of low generating and distributions capacity. Clearly, therefore, the establishment of IRAs as a regulatory innovation to address the infrastructure deficits within Nigeria have not yet yielded the anticipated benefits.

## **6.7 Conclusion**

In tracing the path that led IRAs into the governance trajectory of the two selected countries, Brazil and Ghana, the research has revealed that the two countries share several similarities in their political economy with that of Nigeria. For example, the route of the reception of the IRA transplant in both the reviewed countries was the same as Nigeria. Both were labouring under a yoke of economic problems occasioned

by under-performing SOEs that became a burden too much to bear given the global economic recession of the 1980s. In addition, the reviewed countries and Nigeria share a political economy that has been characterised by a long history of authoritarianism that affected almost all the aspects of their socio-political order. These included regimes that privileged strong men over strong institutions thus contributing to a very weak institutions framework pervading all the facets of the countries socio-economic life. The weak institutional foundations gave rise to patrimonialism, corruption and insecurity.

In the recent past however, all the reviewed countries and Nigeria have moved to democratic governance with a system that has three arms of government that are equal but independent of one another. Within the context of this nascent assimilation of democracy, the IRA model is struggling to find suitable launching pads to survive and sustainably deliver on its mandate. These pads accounted for the success of the IRA model in developed countries. These include separation of powers, rule of law, and an independent judiciary that secures and protects private property rights. The preceding thesis has shown the gradual and tortuous journey the IRA model is having in these countries' political economies in the midst of weak institutional frameworks and near absent critical democratic nuances that are supposed to be its veritable support.

The one major lesson from the experiences of these three developing countries is that development policies should not only identify the appropriate institutional reforms that will provide developing countries with the capacity, clarity and wherewithal to improve their conditions, but should also inquire into their adaptability and functionality. The challenges encountered by each of these countries in a bid to guarantee the independence of their IRAs are germane to and consistent with the problems of instituting development policies and reform initiatives in developing countries around the world without giving prior thought to the contextual limitations of the host country.

It is clear from the above that the political economy of countries matters. The imperative of ensuring the internalisation, localisation and adaptation of the IRA mantra into local conditions and particularities of the hosting country has never been clearer. As Prado states, there are ominous dangers in “adopting a mythical, idealized view of the transplanted legal system rather than developing the necessary critical analysis”<sup>142</sup> before assimilation. A careful fitting of the model into local peculiarities is therefore desirable before it can stand the chance of thriving.

Chapter 7 sets forth a summary of the findings of this research and makes appropriate recommendations.

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<sup>142</sup> Prado, note 17 at 503.

## CHAPTER 7

### CONCLUSION

#### 7.1 Introduction

A statist approach to economic development was the preferred route when Nigeria attained independence. Capitalism was abhorred as being a part of neo-colonialism. The government owned and managed all the economic structures ostensibly to lay a foundation for sustainable economic growth and development. State-Owned Enterprises (SOEs)<sup>1</sup> were set up across sectors of the economy as a vehicle to drive economic activities. A bulging portfolio of SOEs emerged as a result thereby exerting a major demand on the nation's earnings. This demand was however ameliorated by the discovery of petroleum which boosted the financial fortunes of the nation. The emergence of petroleum led to the establishment of a distorted consumerist economy that depended on that primary resource for its sustenance. In the process, agriculture which was the mainstay of the economy was relegated.

A slowdown in economic growth occasioned by the international financial crisis of the 1980s and 1990s and the fall in oil prices at the international market led to a wholesale implementation of a structural adjustment programme of economic reforms that were recommended by the intermediating agencies<sup>2</sup> led by the International Monetary Fund as a condition precedent for economic assistance.

The programme had as one of its components the setting up of Independent Regulatory Agencies (IRAs) to superintend the burgeoning private sector that was being positioned to take over the public sector as the engine room for economic growth. IRAs have now been set to regulate the provision of infrastructures, goods and services in key utilities and sectors of the economy with more being proposed.

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<sup>1</sup> State-Owned Enterprise (SOEs) are defined in Chapter 1.

<sup>2</sup>Dubash, N., *Regulation through the Back Door: Understanding the Implications of Institutional Transplant*, Working Paper No. 42, Jerusalem Papers on Regulation and Governance, March 2012 at 4.



The IRA model of regulatory governance conceptually assumes the existence of strong regulatory commitments on the part of government that is undergirded by strong institutions that can withstand external pressures and deliver a transparent and credible regulatory regime.<sup>3</sup> Given this background, the thesis has dwelt on the sub-optimal performance of IRAs so far in Nigeria and the two selected countries (Brazil and Ghana), within the context of major challenges and limitations.<sup>4</sup> These challenges form the fulcrum of the main findings of this thesis.

The thesis endeavour has in the main, posed and considered one central question: Can the IRA model of regulatory governance function in Nigeria in a manner analogous to its counterparts in the developed economies and is it able to deliver the outcomes it promises within the context of her contextual limitations? A quest to resolve this question has led to a consideration whether the IRA model is the best framework for addressing the challenge of the transition from public to private ownership of utilities in Nigeria.

## 7.2 Main Findings

In tracing the journey of IRAs in the USA from the beginning to when it became a global trademark of infrastructural regulation, this thesis has established that in climes where the IRAs have succeeded, there has been a democratic system of government that adheres to the rule of law undergirded by virile state and supporting institutions as a prerequisite. Within the Nigerian context however, IRAs have not fared well. The

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<sup>3</sup> Eberhard, A., *Regulation of Electricity Services in Africa: An Assessment of Current Challenges*, a paper prepared for the World Bank Conference *Towards Growth and Poverty Reduction: Lesson from Private Participation in Infrastructure in Sub-Saharan Africa* June 6-7, 2005, Cape Town, South Africa.

<sup>4</sup> Kapika, J., and Eberhard, A., *Power-Sector Reform and Regulation in Africa, Lessons from Kenya, Tanzania, Uganda, Zambia, Namibia and Ghana*, 2013, Human Sciences Research Council, Cape Town, South Africa.

following factors have played a significant role in creating an unfriendly or even hostile atmosphere to the successful establishment and functioning of IRAs.

### **7.2.1 Institutional Fragility**

The structure of institutions that ought to 'police', support, restrain and ensure the channelling of socio-political endowments of the country towards productive use have been weakened by ill-prepared leaders leaving the public and private sector in an essentially compromised and ineffective state. The executive arm of government dominates and overreaches the other arms of government in disregard of the concept of separation of powers. This development has prevented the judiciary and the legislature from performing their constitutionally allotted functions as a check on the executive. The judiciary particularly still operates in a subserviently weakened capacity both at de-facto and de-jure levels. The electoral body that is central to giving legitimacy to the political process operates at a lame level hamstrung by the executive arm.

The institutional frameworks that should secure the property rights regime that are the lifeblood of a private sector-driven economy, lack depth. Key essential institutions such as the central bank, financial institutions, stock exchange, and a corporate governance regime operate on the fringes of the nation's economic life without the meaningful impact of sustainable development. Additionally, supporting institutions in the social network spheres such as civil society organisations, the media, political parties, and the public service are nascent, weak or non-existent. To compound the situation the capacity-building institutions that are the feedstock for the needed manpower to drive the workforce operate in a weak state within the framework of a dilapidating educational system.

This has aggregated to a fluid and shallow growth of the democratic experiment that suffers from infancy problems. A fitting eulogy to Nigeria's attempt at building critical institutions that would undergird IRAs is that they all lie prostrate in an

environment driven by powerful interests of an all – powerful, selfish, patrimonial state.

### **7.2.2 Corruption**

The endemic nature of this vice has eaten deep into every facet of national life. The attendant impact has been enormous, ranging from retarding socio-economic development to the diversion of assets away from their intended use, and stifling foreign investments thus trapping the resources available for infrastructural development. This has engendered acute poverty and inequality within the nation's political economy. As a natural consequence, it has abridged investments in infrastructure and undermined the relevance of IRAs.

### **7.2.3 Political Leadership**

The nature and calibre of leaders that have governed Nigeria since independence share common characteristics. These include, their emergence through a route that has generally been accidental, ill-preparedness for high office, incompetence, lack of vision, selfishness, and morally bankrupt, driven for the most part only by steep corruption and crass impunity. This has been against the backdrop of the fact that developed countries' economies are generally a product of good governance watched over by leaders that have the interests of the commonwealth at heart as opposed to the servicing of personal agendas and interests that is prevalent in Nigeria. The incompetent leadership has impacted negatively on reforms and the thriving of IRAs.

### **7.2.4 Strong Men over Institutions**

The level of impunity in the subversion of clear provisions of the enabling laws of IRAs points to the malaise that has been pinpointed in the course of the research: the display of impunity in the conduct of the affairs of the nation by strong men masquerading as leaders. Abridgement of the tenure of regulators without due process and in disregard of the rule of law coloured the landscape of the two IRAs reviewed. This manifestation

has a corroding effect on the vitality and sustainability of the IRA model of governance that thrives on due process, respect for the sanctity of contracts and credibility.

### **7.2.5 The Rule of Law**

The rule of law as a central plank of democratic governance has undergone systematic subversion since independence and continues to face the same fate. Nigeria can thus be rightly considered a nation of many laws including a Constitution that espouses an ideal, but the governance trajectory is devoid of constitutionalism and the rule of law. Judicial capacity and independence are still in its formative stages, and the pitiable state of the rule of law has cast dark shadows over the sanctity of contracts and their enforceability, thus providing an inherent check on the development and sustainability of the private sector and the attendant vitality of IRAs.

### **7.2.6 Lack of Credible Commitments**

Even though the standard model or best practice prescriptions by the intermediating agencies have been followed in the setting up of IRAs, complete with all the characteristics that make them independent with the requisite powers and functions, the government has consistently been shown to find creative ways of influencing regulators. There has been a large difference in what ideal prescriptions in the laws setting IRAs and what is obtained in practice.<sup>5</sup>

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<sup>5</sup> Tremolet, S., and N. Shah. 2005. "Wanted! Good Regulators for Good Regulation: An evaluation of Human and Financial Resource Constraints for Utility Regulation." ERM and Tremolet Consulting report, World Bank, Washington, D.C; Eberhard notes, for example, in the six years since the Electricity Regulatory Board was established in Kenya there have been five different chairmen. The Electric Power Act provides for a four-year term of office and regulators can only be removed under specified conditions (such as fraud). However, the Kenyan government has used another law, the State Corporation Act, which gives the president authority to remove heads of state institutions: Eberhard, A., *Infrastructure Regulation in Developing Countries: An Exploration of Hybrid and Transitional Models*, Working Paper No. 4, 2007, Public-Private Infrastructure Advisory Facility (PPIAF).

### **7.2.7 Insecurity**

Nigeria faces debilitating conflicts of many dimensions: ethno-religious conflicts; a general state of insecurity; and political and economic based violence that has led to the wanton loss of thousands of lives and the destruction of property. These pose a grave danger to any meaningful economic activity and do not allow for a suitable climate for investments and the thriving of business. Acute poverty driven by high illiteracy levels have been implicated in these conflicts, as they fuel the armies of the illiterate and jobless populace. Against this background, are weakened and corrupt law enforcement institutions that provide the coercive apparatus to IRAs to enforce their mandates.

### **7.2.8 Information Asymmetry**

One overarching limitation to the implementation of the IRA model in Nigeria is the lack of attention paid to the vast information requirements for a sound regulatory process. Effective regulation envisages that the consumer and the provider of a service both have certain basic information about the processes, systems and costs associated with the production and distribution of services or public goods.

However, as a result of the dismal literacy levels and dearth in capacity-building institutions in Nigeria, the providers of goods and services operate at an advantageous level in fixing tariffs and determining the quality of services without informed scrutiny from the consumer. The IRAs that should mitigate this information deficiency by brokering information exchange between the service provider and consumers are hampered by limited capacity both at institutional and individual levels.

## **7.3 Comparative Findings**

The challenges Nigeria faces are replicated in other jurisdictions that share common political economies such as Brazil and Ghana whose experiences have been reviewed. The two countries have had similar challenges and have undergone periods of struggles

and failures on account of the challenges. The logical deduction from these experiences is that it would be pedestrian to suggest that the IRA mantra is *the only* means available for the provision of adequate, safe, reliable and affordable infrastructure, services and goods that the country needs very badly.<sup>6</sup>

This thesis has in the main posed and considered one central question. Can the IRA model of regulatory governance function in Nigeria in a manner analogous to its counterparts in the developed world and is it able to deliver the outcomes it promises within the context of her contextual limitations? The primary answer to the above research question is that the fabric of which IRAs are made is ill-suited to Nigeria's present developmental state, and indeed developing countries at large, and hurts rather than enhancing developmental outcomes.

The kernel of this thesis is that Nigeria must find a good regulatory fit to tackle infrastructure regulation. What this calls for is a systematic process of finding matching solutions for problems that are country specific. The thesis has shown that there are no "best practices" in addressing infrastructure regulation. An effective infrastructure regulatory system varies not only by industry, but also by country<sup>7</sup> and even region. It is potentially damaging to propose a regulatory concept as the ideal, the way the IRA has been propped up. A regulatory framework should be preceded by a keen understanding of the institutional contexts of the country and the outcomes which the

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<sup>6</sup> Even in countries with reasonably competent judicial systems, dealing with regulatory matters can be very difficult. The concept of independent regulatory agencies is new, and the subject matter is often arcane and outside the normal experience of judges. This is particularly the case where courts have historically played a limited role in regard to administrative matters. Moreover, judicial systems may not be structured in such a way as to handle regulatory matters expeditiously. Bureaucratization and multiple layers of appeals can be quite disruptive to effective regulation, even in those circumstances where the courts are fully functional. Thus, transitional arrangements are always something that might be contemplated in regard to the role of the courts. Brown, A., et al, *World Bank Handbook for Evaluating Infrastructure Regulatory Systems*, 2006, The World Bank, Washington, DC at 103.

<sup>7</sup> Stern, J., *The Regulatory and Institutional Dimension of Infrastructure Services*, Trade and Development Board, Trade and Development Commission, Multi-year expert meeting on services, development and trade: the regulatory and institutional dimension Geneva, 17–19 March 2009.

regulatory trajectory will attract. As Estache and Wren-Lewis have stated, “one size does not fit all in regulation either!”<sup>8</sup>

Worldwide reports of failures of regulatory interventions through IRAs have forced governments and investors alike to ask what wrong with the IRA model. From India to Ecuador to Senegal and Brazil and Nigeria the same challenges keep cropping up: the IRA model has been unable to deliver the outcomes intermediating agencies touted them to.<sup>9</sup>

In a survey carried out by Lamech and Saeed,<sup>10</sup> investors frequently blamed the lack of reliable and affordable services on flaws in many of the more than 50 new IRAs recently established in developing countries. Of particular note and ironic too is the finding that IRAs do not respect regulatory commitments they themselves have put out.<sup>11</sup> The authors have argued that there has been too much emphasis on creating IRAs

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<sup>8</sup> Estache, A., and Wren-Lewis, L., *Towards a Theory of Regulation for Developing Countries: Following Laffont's Last Book*, ECARES Working Paper 2008 \_018.

<sup>9</sup> Bakovic, T., et al, *Regulation by Contract: A New Way to Privatize Electricity Distribution?*

Energy and Mining Sector Board Discussion Paper, Paper No 7, May 2003; In India, the AES Corporation informed the government of its desire to sell its ownership interest in a local distribution company because it saw no way to make the company a viable commercial enterprise. Shortly thereafter, another Indian power company that had invested in three other distribution companies months later also threatened to leave. In Ecuador, the government announced that it was abandoning its plans to privatize 17 state electricity distribution companies after receiving a poll that showed that more than 71 percent of the general public was opposed to such privatizations. In Senegal, a new government terminated its agreement with Senelec, a consortium of Tractebel/Hydro Quebec, after accusing the consortium of failing to improve the frequency and duration of blackouts. In Brazil, AES experienced major financial problems for Electropaulo, its distribution company in Sao Paulo – problems caused in part by a significant drop in sales and revenues following in the wake of a government-mandated rationing program. In Nigeria, the quality of service offered to customers with the GSM technology continues to deteriorate with the utility regulator unable to stem the tide while the electricity regulator NERC despite its several tariff orders and rulings has been unable to ensure the dispensing of light but rather darkness!.

<sup>10</sup> Lamech, R., and Saeed, K., *What International Investors Look for When Investing in Developing Countries*, 2003, Energy and Mining Sector Board Discussion Paper 6, World Bank, Washington, DC.

<sup>11</sup> Recently the Nigeria's electricity regulator, NERC, was faulted for the same reason by Generation and Distributions companies who accused NERC, (and not without merit) of renegeing on the commitments that were contained in the licenses terms derivable from the licenses issues by NERC!.

as the key to successful privatisation, pointing out that this amounted to a naïve a recommendation for most developing countries.<sup>12</sup>

Thus, it is necessary to search for alternative means of achieving the desired outcomes of accountable and responsible regulation of utilities, taking due cognisance of the peculiarities of local extenuating circumstances in Nigeria.

The imperatives for this search are underlined by the recent admission of the World Bank, the original architects of the IRA model, that the model has not worked as intended especially in the temperamental and weak institutional environments that abound in developing economies.<sup>13</sup> What Nigeria needs at this point therefore, is the evolution of a unique regulatory governance template(s) that is situated within her contextual institutional and legal limitations to address the infrastructure deficits. This route offers more hope for sustainability than simply transplanting international best practices and parachuting them into an inhospitable environment which portends harm rather than good.<sup>14</sup>

Furthermore, the need for the evolution of a home-grown contextually relevant solution to address the dearth of infrastructure provision has been acknowledged by a leading writer in this field, Eberhard, who has argued that the

biggest single mistake made in African power sector reform is the almost automatic presumption that the 'reform models' that may be appropriate in large industrialised and electrified countries with revenue sufficiency would be equally applicable to small, poorly

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<sup>12</sup> Even though this survey was in the electricity industry, the utility nature of the services and the nature of the governance system are the same as other infrastructure utility sectors.

<sup>13</sup> Eberhard, Note 3; Public and Private Sector Roles in the Supply of Electricity Services Operational Guidance for World Bank Group Staff 2004. In addition, in a recent speech to Eastern European energy regulators, Katherine Sierra, Vice President for Infrastructure, observed that: "While a 'fully independent' regulatory entity is clearly ideal, it is unrealistic to expect that such a regulatory institution can be created and fully functioning in a short period of time." Conference of the Energy Regulators Regional Association, Budapest, Hungary, 11 April 2005.

<sup>14</sup> The statement by the Fyodor Dostoevsky in the *Brothers Karamazov*, Book 11, chapter 9 bears quoting here: "There you have it – reforms on unprepared ground, and copied from foreign institutions as well – nothing but harm!".



electrified African countries with tariffs that often fall far short of recovering costs.<sup>15</sup>

Notwithstanding the foregoing, which has shown the illfitting nature of IRAs within intemperate political economies of developing countries such as Nigeria, it needs to be recognised and acknowledged that the issue is multi-dimensional and has two sides – the western investors and the local players, and ought to be seen as such. While the western donors who bring the private sector financing need to craft systems and processes including IRAs that would secure and guarantee a repayment of the loans they have made, there is also the need to take into consideration the concerns of local consumers and local peculiarities. This situation calls for a delicate balance between the demands and desires of these two constituencies, especially as their interests differ markedly.

#### **7.4            Background to Recommendations**

The overriding challenge therefore is to craft a regulatory template that addresses the concerns of the primary players in the value chain: the private investor, government and the consumer. Private investors' two major concerns about regulatory reform and systems are firstly, obtaining clear regulatory commitments from government, and secondly, receiving assurances that the commitment will actually be honored in order to allow them to recover investments and have a reasonable return thereon.<sup>16</sup> The consumer on the other hand desires the best possible products and services and affordable prices devoid of collusion, exploitation and anti-competitive practices. The government, as a third variable, is essentially interested in economic and political tranquility: a regime that ensures harmony within the body politic, devoid of protests

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<sup>15</sup> Eberhard, note 3 at 21.

<sup>16</sup> Ranjit, L., and Saeed, K., *What International Investors Look for When Investing in Developing Countries*, 2003, Energy and Mining Sector Board Discussion Paper 6, World Bank, Washington, DC, at 10 in Brown, note 4 at 108.

and discontent arising from poor services at high prices, a sure recipe for election losses.<sup>17</sup>

As a natural follow-up, such an adopted template must seek to ameliorate or mitigate the inherent weaknesses in the institutional, legal and socio-political economy of Nigeria including factoring into those ingredients that would reduce and ultimately eliminate corruption within the regulatory value chain.

## 7.5 Introduction to Recommendations

In the global theoretical architecture of infrastructure regulation, there are two major variants: the Anglo model which has its roots in the USA<sup>18</sup>, and the Continental West European Model, also referred to as the French model or Ministerial Regulation, with emphasis on detailed concession contracts.<sup>19</sup> Even though both variants have weaknesses in their structure and operations, these have been toned down by the presence of strong institutions, a vibrant rule of law regime and mature political systems in the host countries.

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<sup>17</sup> Brown, et al, note 6 at 98 and 99. Two recorded occurrences therein bear this out succinctly: It was reported that the president of one Latin American nation, when informed that the electricity regulatory commission had raised retail electricity tariffs by more than 10 percent without consulting him, said, "Who is this guy and how can I fire him?" Secondly Mark Jamison, director of the Public Utility Research Center at the University of Florida, writes that "[w]hen the Governor of Iowa appointed Dennis Nagel to be chairperson of the Iowa Utilities Board several years ago, the only thing that the Governor requested is that Dennis *not* do anything that would cost the Governor the next election. The Governor didn't mention protecting consumers, protecting shareholders, or obeying the law. The Governor asked only that Dennis not cost him the next election." Mark Jamison, 2004, "Survival Guide for the Independent Regulator," Working Paper, Public Utility Research Center, University of Florida, Gainesville, Fla., p. 1; available at <http://bear.cba.ufl.edu/centers/purc/>.

<sup>18</sup> This model is generally seen as the epitome of *independent* regulation, with its emphasis on specialist regulatory institutions operating within a highly *rule-based and legalistic* framework. It is explicitly *adversarial* with an emphasis on *public hearings*. The resulting structure is locked into a system of administrative law in which the courts (up to and including the Supreme Court) play a major role. Indeed, the courts and legal concerns can take over the substance of regulation as well as its form.

<sup>19</sup> This model is where a government department regulates (and typically sponsors) a state-owned monopoly utility. This is the pre-1989 England and Wales model with the Department of Energy regulating the CEGB, in association with the Treasury. It was the standard West European model in the period 1960-90 and was adopted in many countries.

For the Nigerian context however, in order to harvest the strengths of these two variants while at the same time mitigating and ameliorating the identified weaknesses in Nigeria's political economy, this thesis recommends the fusion of two models drawn from a wealth of literature.<sup>20</sup> The literature identifies the following as being in the family of transitional/hybrid models suitable for developing economies. These include regulatory contracts, contracting-out or outsourcing of regulatory functions, advisory regulators, and partial-risk guarantees for regulatory failure.

The accompanying Table 2, developed from parts of the reviewed literature,<sup>21</sup> presents in a tabular form the strengths and weaknesses of each of the transitional/hybrid models.

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<sup>20</sup> Laffont, J.J., *Regulation and Development*, Federico Caffé Lectures, 2005, Cambridge University Press; Eberhard, note 3; Brown, note 6; Kapika and Eberhard, note 4.

<sup>21</sup> Ibid.

TABLE 2

**Hybrid Models: Their Features, Strengths and Weaknesses**

S/N	Model	Essential features	Drawbacks	Strengths
1	<b>Regulation by Contract</b>	Regulation by contract entails the prior detailed specification of the governance regime in one or more legal instruments including the enabling law, subsidiary legislation basic law, secondary legislation, licenses, concession contracts, and power purchase agreements. The enforcement is then left either to a regulator or line ministry with limited discretion.	Applying the letter of an agreement executed over time could elicit outcomes that would be detrimental to economic outcomes and the regulatory intents. Unforeseen developments in exogenous variables including with contract terms themselves impact on risks and costs and produce outcomes totally unrelated to original intents.	Model promotes regulatory certainty, minimises discretion; and gives for room for predictability; constrains political leaders from tampering with contracts; and also provides comfort for investors.
2	<b>Contracting-Out or Outsourcing</b>	Use of external consultants, either IRAs or as stipulated in a regulatory contract, to perform functions such as tariff reviews, bench-marking, monitoring of compliance or dispute resolution. Very useful where regulatory independence, competence, capacity or legitimacy is lacking.	Can be politically sensitive raising concerns about national security and pride especially where international consultants are involved. The model also attracts resistance from line ministry and bureaucrats who resent contracting out functions to consultants as these hedges them from interfering.	Five major potential advantages: A cost –benefit choice that enhances in-house capacity building through training and mentoring; increases regulatory competence through access to specialized skills and knowledge, and leveraging international reputation; enhances regulator’s independence and legitimacy. With external diversified skills, regulatory decisions are perceived to be more credible.
3	<b>Advisory Panel</b>	Advisory regulators merely offer advices to the line ministry or regulator with no obligation for its adoption. There are emerging variants termed “strong advisory regulator model”, in which the advice must be given in a public document that provides a clear statement and explanation of the decision.	Although this is a politically convenient compromise, one that allows politicians to shift blame in the event of public repercussions, it also has the potential of being a dead-end rather than a short-term transitional arrangement.	This model is strong on accountability by requiring the line ministry or IRA to publicly justify positions taken when they act on an advice issued by a Panel.

4	<b>Partial Risk Guarantees (PRG)</b>	<p>The essence of a PRG is to provide private investors with explicit financial compensation if a government fails to live up to a specified regulatory commitment that has been guaranteed. Within regulatory systems they are a form of insurance against defined regulatory risks. It only falls due if an investor can show noncompliance. Then the World Bank (or some other financial institution) will make a payment to the Investor and recoup from the government.</p>	<p>PRGs are only feasible if they are accompanied by a fairly detailed tariff-setting system which is normally explosive in developing economies. No insurer, whether it is the World Bank or some other financial institution, will be willing to provide insurance unless the nature of the insurable event is reasonably clear. Tariff-setting systems by their nature are unpredictable and flexible.</p>	<p>PRG's strengths lie in the prompt settlement of entitlements where there is demonstrable infringement by the country government or infrastructure regulator. The payment is not delayed to the end of potentially long legal or arbitration processes. This liquidity support is greatly valued by and is a major comfort to reluctant investors.</p> <p>On the customer part, PRGs may help consummate transactions that otherwise would not have occurred thus making services available that otherwise would not have been. Secondly, they heighten investors' confidence and this, in turn, lowers cost of capital, which leads to lower cost of supply, and ultimately to lower tariffs for consumers.</p>

**Source:** Table generated by Author

## 7.6 Recommendations

Of the four hybrid models of regulatory governance above, the first two, regulatory contracts and contracting-out or outsourcing of regulatory functions offer more promise in tackling and ultimately mitigating the institutional, legal, political and other contextual limitations of Nigeria within the regulatory mix of IRAs. The two models have fared well where they have being calibrated to fit into the peculiar circumstances of each nation that they have been implemented.

### 7.6.1 **Regulatory Contracts**

There are essentially two different operational definitions<sup>22</sup> of regulation by contract.<sup>23</sup> One is regulation without a regulator.<sup>24</sup> Under this definition, the regulatory contract is totally self-contained and self-administered like a commercial contract. All disputes arising over implementation are handled by a regular court, an administrative court or a special expert panel. This is an appealing concept because it offers the possibility of putting regulation on autopilot and eliminates the need to create a new regulatory entity.

A second definition is that, regulation by contract is a detailed tariff-setting agreement administered by an independent regulator. Under this definition, the regulatory contract does not replace the regulator but substantially limits the regulator's discretion. In particular, it forces the regulator to set tariffs based on specific formulas rather than just general principles.

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<sup>22</sup> Even though these definitions are proffered within the framework of research in regulation of electricity services, it equally applied to and is germane to other utilities regulation such as telecommunications, etc.

<sup>23</sup> Bakovic, T., et al, *Regulation by Contract: A New Way to Privatize Electricity Distribution?* Energy and Mining Sector Board Discussion Paper, Paper No 7, May 2003 at 16.

<sup>24</sup> Bakovic, et al note that in referring to "long-term concession or leasing arrangements, the World Bank's 1994 *World Development Report* stated that "these arrangements....do not require the establishment of independent regulatory bodies because regulatory procedures [and regulatory provisions in general] are specified in the underlying contract" (p.10). Alternatively, if there is a regulator, it is limited to functioning as a "contract monitoring office."

This thesis adopts and recommends the second definition for two reasons. Since IRAs have already been established in two major utilities in Nigeria and there are legislative initiatives in the National Assembly to establish four more, it will be ill-advised to adopt a model that side-lines institutional set-ups established by law within a sectoral setting. Secondly, this thesis is not aware of any developing countries where the behaviour of a privatised entity is completely controlled by a regulatory contract alone, with no further intervention by a government or regulatory entity. In fact, research shows that regulation without a regulator exists in utility sectors only in the French water sector,<sup>25</sup> but the conditions that makes it possible in France are not likely to be replicable in other countries, especially in developing countries such as Nigeria as a result of fragile systems.

Regulatory contracts combined with the IRA model have been implemented in many Latin American countries like Chile with commendable success. It has been successful in ushering in and sustaining the needed private sector entry, investment and participation in more than 60 privatisations. In addition, it has been implemented with commendable outcomes in Uganda in electricity generation<sup>26</sup> and has also worked well in the French Water Sector for several years.<sup>27</sup> It holds a lot of promise especially within the weak capacity endowments prevailing in Nigeria. Part of the appeal is that it can operate on “autopilot”<sup>28</sup> with predetermined and thoroughly negotiated contracts. This mitigates the lack of local capacity in Nigeria to fashion and implement regulatory tools that would meet the regulatory challenges of infrastructure provision. Most importantly too, with pre-determined and negotiated contracts in place, the exercise of discretion that breeds corruption will be tackled. Two studies by Ranjit with Saeed and

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<sup>25</sup> Shugart, C., *Regulation-by-Contract and Municipal Services: The Problem of Contractual Incompleteness*, Ph.D. thesis, Harvard University, May 1998.

<sup>26</sup> Eberhard, A., *Infrastructure Regulation in Developing Countries: an Exploration of hybrid and transitional models*, : a paper prepared for the African Forum of Utility Regulators 3<sup>rd</sup> Annual Conference, 15-16 march, 2006, Windhoek, Namibia.

<sup>27</sup> Bakovic, T., et al, *Regulation by Contract: A New Way to Privatize Electricity Distribution?* Energy and Mining Sector Board Discussion Paper, Paper No 7, May 2003.

<sup>28</sup> Ibid.

Brown, et al<sup>29</sup> show that investors tend to prefer a regime that relies on long term regulatory contracts as opposed to IRAs *simpliciter*.

### 7.6.2 Contracting-Out or Outsourcing

Contracting-out or outsourcing is defined as the use by a regulator of an external contractor, instead of its own employees, to perform certain regulatory tasks or function(s) such as tariff reviews, quality of service competition and consumer protection issues. It is usually done on a temporary or transitional basis by an IRA.<sup>30</sup> It has two main types: in advisory outsourcing, an external adviser presents several alternatives in a decision-making framework to the regulator; and in binding outsourcing, the recommendations given by the external provider must be directly applied, with no choice given to the regulator on alternative options.<sup>31</sup>

The strengths of contracting-out or outsourcing regulatory functions to outsiders better equipped to handle them allows for the sourcing of specialised skills and also attracts legitimacy and respectability to the regulatory process. Furthermore, outsourcing reduces costs without compromising quality, and allows for economies of scale as well as saving time. One other advantage of this model is that it bolsters regulatory independence as it allows the IRA to benefit from the reputation and competence of the external agent.<sup>32</sup> Outsourcing comes well recommended as a tried and tested model that has been regularly utilised by nearly all IRAs globally.<sup>33</sup>

This thesis recommends that regulatory contracts and contracting-out or outsourcing have the potential of addressing the dearth in infrastructure provision and

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<sup>29</sup> Ranjit and Saeed, note 16 .

<sup>30</sup> Tremolet, S., *Outsourcing Regulation When Does It Make Sense and How Do We Best Manage It?* PPIAF Working Paper, No. 5, 2007.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid; Eberhard, note 26; Tremolet, S, et al, *Contracting Out Utility Regulatory Functions: A report by Environmental Resources Management (ERM) for the World Bank*, Washington DC.

<sup>33</sup> A survey of 5 IRAs globally by Tremolet, et al found that 75% outsourced at least some regulatory tasks and 205 to 30% of their budgets to outsourcing. Out of IRAs globally that do not as of yet outsource, 90% indicated that they were planning to do so in the future.



services, while at the same time surmounting the contextual limitations of Nigeria in the following ways:

#### 7.6.1.1 *Credible Commitments*

The two recommended variants address the concerns of private investors' in obtaining regulatory commitments from government, and assurances that the commitment will actually be honoured to allow recovery of investments and a reasonable return on investments.

Governments in developing countries and Nigeria in particular are long on promises but short on honouring them. Commitments made are whimsically sacrificed at the altar of policy changes which has been the hallmark of government in Nigeria. An uncertain investment climate has been shown to be a sure recipe for investment shyness on the part of the private sector. Regulatory contracts and out-sourcing of functions offers a window to mitigate the lack of credible assurances to the private sector. Typically regulatory contracts being long term and negotiated with the unforeseen future in mind, and are not subjective. They objectively set the broad principles without expressing subjective interests. This is important within the Nigerian context where personal interests have a major role to play in regulatory decisions, be it within the IRAs or line ministries.

#### 7.6.1.2 *Mitigation of Corruption*

This thesis has demonstrated the negative effect corruption has had on the provision of infrastructure and services. Thus, for any model to be effective, it must address the corruption which pollutes all infrastructure streams. A major advantage of regulatory contracts and outsourcing is that, by their very nature they serve to mitigate and tackle the menace of corruption at its root in the following ways:

- a) Regulatory contracts are typically long lasting. This discourages ad-hoc close-hand dealings that exacerbate corruption, and rather promotes certainty.

- b) One of the benefits of regulatory contracts and outsourcing is that they promote the minimisation of the exercise of discretion, a route through which corruption thrives. As this research has indicated, where discretion thrives, officials utilise it as an avenue for exercising it capriciously for personal as opposed to societal interests.
- c) Outsourcing allows outside professionals not having prevailing interests or within the regulatory space to dispassionately chart the way forward as opposed to regulators and line ministries that have vested interests.

#### 7.6.1.3 *Predictability*

The long term nature of regulatory contracts allows for regulatory certainty and predictability. Nigeria's investment climate is characterised by policy somersaults that have become the norm. A regulatory system that locks-in the roadmap of the regulatory space enables investors to take risks confidently and invest with the assurance of recovering investments, not worrying about changes in policy. Furthermore where contracting out occurs, the parameters utilised to arrive at decisions are transparently evolved and determined. This path to decision making lends itself to providing greater confidence to investors.

#### 7.6.1.4 *Certainty*

Within the context of a rule of law regime, detailed regulatory contracts that spell out all the rules of engagement in a precise and comprehensive manner will serve as a check against corrupt judges who may want to interpret hazy parts of the contracts in such a manner that it attracts pecuniary benefits. In addition where regulatory functions are contracted and carried out by outsiders whose only interest is professionalism, the decisions are more likely to be sustainable.

#### 7.6.1.5 *Constraint on Political Leaders*

Regulatory contracts, being binding documents, serve to put political leaders on notice by tying their hands from abridging existing terms of a contract arbitrarily to satisfy short term political interests to influence electoral cycles. In addition, where regulatory decisions are contracted out the temptation for political leaders to pressurise regulators with a view to influencing them will be removed. This thesis has shown the overbearing influence political leaders have on institutions and a model that seeks to place constraints on this influence and the accompanying arbitrary exercise of power will allow for sustainable investments in infrastructure.

#### 7.6.1.6 *Credibility*

IRAs have come to be seen, especially in a nascent democratic setting as in Nigeria, as just another arm of government. This thesis has shown that attempts by IRAs to assert their independence have been countered by strong leaders that employ different methods to frustrate their autonomy. Thus IRAs do not attract the same kind of acceptance their counterparts in mature democracies do. Outsourcing mitigates this lack of acceptability. External consultants attract credibility to the regulatory process and enhance the quality of decisions in the eyes and minds of the consumer and the public.

#### 7.6.1.7 *Address Institutional Fragility*

By utilising external and international capacity, the in-house capacity in IRAs that is lacking is ameliorated and a process of building internal capacity through the close interface of external consultants with regulators takes root. The foregoing thesis identified the poor state of the educational system both at the lower and tertiary levels thus leading to paucity in research and training. Adopting a template that allows for accessing outside capacity to complement and build in-house capacity appears to be the way forward until the necessary capacity is built to populate IRAs.

#### 7.6.1.8 *Enhance Regulatory Capacity, Quality and Credibility*

Decisions arrived at within a regulatory space through outsourcing to external consultants and international experts tend to have more credibility and are more sustainable. This is more so within the context of a dearth of local capacity and corrupt influences that hinder a knowledge-driven regulatory processes that is anchored on transparency.

### 7.7 **Final Word**

This research has proceeded from a *fait accompli* position that IRAs have already been injected into Nigeria's infrastructural governance regime. However, given the challenges within the Nigerian regulatory landscape, enhancing the capacity of the already created IRAs and the emerging ones is a key consideration, and the most judicious way towards attaining sustainable social and economic outcomes. Capacity here involves addressing the educational deficits in Nigeria's school system such as allowing the churning out of graduates that will be empowered to meet the challenges of the day. In addition, research institutions must be nurtured to develop a specialized curriculum to meet the specific professional and cognate needs of IRAs.

Secondly, sequencing the setting up of IRAs must be deliberately calibrated. In the present landscape, the existing IRAs should move towards a regime of developing long term regulatory contracts that will comprehensively spell out the regime as if it will be on auto-pilot in order to allow for certainty and predictability in the regulatory systems. Where the existing and new IRAs utilise the window of developing long term regulatory contracts and contracting out some of their functions to competent external consultants, the regulatory process would be more credible. Presently, given the limited endowments Nigeria has within the field of infrastructure regulation, IRAs are well placed to utilise the suggested models of regulatory contracts, and contracting out some of their functions, in order to allow for harvesting and institutionalisation of the

appropriate institutional capacities. It takes years to build, equip and populate training and research institutions that can serve as the feedstock of professionals to work in IRAs. Until this capacity-building avenue is readily available locally, regulatory contracts and outsourcing of functions seem the reasonable way out. Any path outside of this would be “akin to trying to build skyscrapers but on foundations plied with mud and sand.”<sup>34</sup>

The limitations within Nigeria’s regulatory space are multi-faceted. Building and nurturing new institutions is not a quick fix. It becomes a more difficult situation when what needs to be done includes the change in the institutional character of existing IRAs that have developed habits that need to be reformed and done away with.

Furthermore political institutions take time to develop and evolve; so does the time-tested rule of law doctrine. IRAs have developed over decades of learning in the USA and cannot take root overnight in Nigeria. Corruption, though a global menace, has become an institution in itself in Nigeria. To uproot it, a deliberate model that discourages or minimises the exercise of discretion, the entrenching of the separation of powers and the rule of law doctrines have to be absorbed. Only through this will Nigeria see the emergence of strong institutions as opposed to strong men as is the present situation.

There needs to be an analytical process of calibrating the IRA model into one smooth mix by utilising regulatory agreements and contracting out of functions until suitable capacity is built in-house in the IRAs. Such steps will allow IRAs to take into consideration the contextual limitations of their environment, and deliberately work to ameliorate and mitigate them while at the same time build in-house capacity as a first step towards intended regulatory outcomes. The mere transplanting of the IRA model into the Nigerian regulatory climate, far from being an answer to the infrastructure

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<sup>34</sup>Jarvis, D., *Regulatory States in the South: Can they exist and do we want them? The Case of the Indonesian Power Sector*, Lee Kuan Yew School of Public Policy Working Paper Series December, 2010 Working Paper No.: SPP10-11 at 29.

deficits in Nigeria, is sure to produce outcomes totally unexpected, “reinforcing the poor governance outcomes they are designed to overcome.”<sup>35</sup>

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<sup>35</sup> Ibid

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